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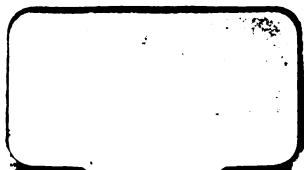
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# CHRISTIAN LIBERTIES

—IN—

## BOSTON.

A SKETCH OF

### RECENT ATTEMPTS TO DESTROY THEM

THROUGH THE DEVICE OF

### A Gag-By-Law for Gospel Preachers.

---

c'  
 WRITTEN AND PUBLISHED BY  
 WM. F. DAVIS,  
 MT. WASHINGTON, CHELSEA,  
 MASS.

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## INTRODUCTION.

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### FRIENDS OF CHRISTIAN LIBERTY :

These pages have all been written or compiled in Suffolk Jail, since my second incarceration, on the 12th day of the 10th month of this year. They lack the supervision of even a single earthly friend. To err is human. But it is believed that whatever mistakes occur in the following pages, sent to press chapter by chapter as soon as written, in response to printer's call for "copy," to be in type by a specified time, are but as the small dust of the balance in comparison with the gigantic wrong here assailed.

The saintly Heman Lincoln, late Professor of sacred history in Newton Theological Seminary, not known to me personally until after my first imprisonment for preaching, by his letters, published in the *Boston Journal* and in other papers, called the attention of citizens far and wide to the limitless usurpation attempted through Boston revolutionary by-lawry. Besides these patriotic published protests, the writer received within four months past six private communications from Professor Lincoln, burning with righteous indignation at the flagrant outrage upon the rights of free-born American citizens embodied in the odious ordinance. Had it not pleased God to give our beloved brother rest from his labors, before even a single chapter of this pamphlet was written, he would doubtless have contributed the Introduction to the following pages, and have supervised the whole, as he had kindly signified his willingness to do.

He has joined the glorious company of the martyrs. Abel, Enoch, Daniel, Jeremiah, Stephen, Peter, Paul, Wil-

liam Tyndal, John Rogers, John Bunyan, the Huguenots, Roger Williams, George Washington, Wendell Phillips, John Brown, and a bright throng of kindred spirits, have, as the writer believes, lately received direct, and very fresh tidings from that fearless, and well-nigh peerless soldier of Christ, concerning this latest Boston notion for ordaining anarchy.

The publication of nearly all the press notices and letters bearing on the iniquitous ordinance must be deferred. Intelligent Christians, with whatever denomination they may be connected, will not misunderstand the writer, in his arraignment of the Rum-Jesuit conspiracy, to which he believes we owe a specimen of City-Council legislation that might be fitly designated, *an act for producing riots, for annihilating municipal order, and for exterminating public peace.*

God's children, known of Him, knowing and loving one another, and departing from all iniquity, are to be found in all those outward communions known in man's directory as "Greek Church," "Armenian Church," "Catholic Church," "Episcopal Church," "Methodist Episcopal Church," "Presbyterian Church," and many others. But whatever outward folds these true children of God may now be catalogued in by us, God reckons them all as members of his "*one flock.*" John 10: 16. True Greek text.

They are all really members of the One Catholic, Apostolic, Davidic, Abrahamic, Noachian, Patriarchal, True Church of Christ. They are all martyrs, witnesses, missionaries, or disciples of the Lord Jesus Christ. But it is equally manifest to all everywhere, who are taught of God, that in every one of the various "denominations" there are to be found children of the devil, haters of Christ and of his gospel and of good men, who of course *pretend* not to be such.

These men are full of falsehood, treachery, hypocrisy, and

flattery. Their speech doth bewray them. By their fruits they are known. On the one hand, as Lowell says,—

[They] “dally cower, and cringe, and plot,  
And Sinais climb, and know it not.”

Their intercourse with each other is by private winks, and signs, and passwords, and grips, and plots, and secret meetings. By these means they devise, on the other hand, how to gratify their appetite for riches, and praise of men, high-sounding titles, foppish regalia, expensive dinners, after-dinner flattering speeches, vain parades, and whitewashed sepulchres. Whatever names these men may apply to themselves, they are really members of the Catholic Apostate, Cainish, Sodomite, Baalamite, Nicolaitain, Romish, Rumish, Jesuit, Mormon, Masonic, Tobacco, Satanic Church.

From such separate thyself. They gave to Boston the gag-by-law for gospel preachers, concerning which the reader may well ponder the subjoined first two leading articles in *THE CONGREGATIONALIST AND BOSTON RECORDER*, BOSTON, THURSDAY, JULY 24, 1884, in contrast with what appeared in that journal on the sixth day of last month :

A Christian whom circumstances have misrepresented, but whose conscience is clear, always has this assurance, that he can afford to wait for his vindication.

Rarely, if ever, does integrity fail to be recognized at last. The words of the Psalmist, “He shall bring forth thy righteousness as the light,” are certain of fulfilment. Matters never have been settled finally unless they have been settled rightly. It is in accord both with the nature of things and with the divine will that goodness shall triumph over evil, and that its supremacy shall be evident to all; and any beliefs, plans, efforts, or even any apparently established institutions, which are based upon the disregard of this fact, are built upon rotten foundations and are certain to fall. The inherent buoyancy of truth brings it up to view sooner or later, and God makes it so radiant that nobody can fail to perceive its glory.

---

It is time for the citizens of Boston to wake up to the fact that the sacred right of free speech is being interfered with unjustifiably by an ordinance of the City Council. On Sunday afternoon last,

two evangelistic preachers were arrested on Boston Common and taken to the station-house for addressing a portion of the great throng which was waiting for the hour of the Sunday concert.

According to all accounts, they were behaving in an entirely orderly manner, and their remarks were so acceptable to the crowd that they themselves had to quiet demonstrations of indignation at their arrest.

*There is no need of any such ordinance as the one thus enforced. There was legislation enough without it to prevent or check any disorder, and if a thousand citizens, more or less, choose to gather on the Common to listen to a preacher, both he and they have the moral right to be there, so long as they conduct themselves in an orderly manner, the City Council or anybody else to the contrary notwithstanding.*

The italics are mine. The position here advocated is also that which from the first has been consistently maintained by the humblest servant of the common people for Christ's sake.

WILLIAM F. DAVIS.

Cell No. 18, Suffolk Jail,  
Charles St., Boston, Mass.  
11, 17, 1887.

# CHRISTIAN LIBERTIES IN BOSTON.

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## CHAPTER I.

### THE BOSTON GAG FOR GOSPEL PREACHERS—REASONS FOR THROTTLING IT.

It has been said that the unexpected is sure to happen.

One would hardly think it ought to have been expected that ever, as now, "the Cradle of Liberty" would cherish a wholesale measure for strangling free public worship.

Some account of the introduction of this serpent into the cradle of the young giant of American freedom, may interest friends of the baby, who may yet strangle the strangler.

The Boston gag-by-law does, indeed, seem to have been first "adopted as a war-measure," at the bidding of the rumsellers of Boston; just as the murders of Haddock and Gambrell were adopted as war-measures by saloonists in Iowa and Mississippi.

For many years prior to the year 1862, a Scotchman named Clure used often to "talk temperance" on Boston Common and in other public places, in a manner not as agreeable to poison-venders as are the serenades tendered them by Howard Crosby of New York, and C. A. Bartol of Boston.

In 1862, the City Council passed a by-law to shut Clure's mouth, and the mouth of every other man who might be or become a public witness of the reeking abominations of the Boston liquor traffic. They put this gag-by-law into the hands of the mayor and aldermen of Boston. Just as the City of Newport R. I. passed an ordinance to silence one man, under which ordinance no person is allowed the exercise of his general rights pledged in the charter without a prior special permission from the mayor. In this particular case, the City Clerk of Newport believes the public peace to have been infringed by "the abuse and ill-treatment" received by the man whom the city fathers wished to "protect," and so they passed a general gag-law, instead of proceeding against the hoodlums, or trying to prove, and deal with as insane, the man "who is considered insane partially," as the City Clerk writes.

When the writer of this, on a missionary tour to Block Island, two years ago, passed through Providence and Newport, he held open-air meetings in Olneyville-Square in Providence, and on Washington Park in Newport.

The mayor of Newport, for the easing of his own conscience under the ordinance, as he said, sent a letter to the writer, who had advertised an open-air meeting on the Park for the afternoon of the fifth day of the week, authorizing him to hold services on any park in the city.

Of course, *an ordinance which is administered in this manner* is not felt by the majority of the citizens to be injurious, but under the control of wicked men, if now allowed to stand without remonstrance, it eventually

might easily become a weapon of outrageous oppression ; just as it is now in Boston.

The latest form of the Boston gag-by-law is contained in Revised Ordinances of Boston 1885, p. 135, Chapter 42, Sec. 11 : " No person shall, except by the permission of the mayor, deliver a sermon, lecture, address, or discourse on the Common, or other public grounds."

This ordinance is treated by the courts as " the continuation " of an ordinance in the Revised Ordinances of Boston 1883, p. 116, Chapter 37, Sec. 11, so far as it is like that ordinance, and as repealing it wherein they differ.

The two ordinances are alike, except that in the latest revision the control of public speaking in Boston is affirmed to be wholly under the jurisdiction of the mayor, while in the revision of 1883, it is said to be at the sole disposal of a " joint committee," consisting of eight, of whom three are members of the board of aldermen and five of the common council. The City Council consists of the mayor, twelve aldermen, and seventy-two common councilmen, eighty-five persons in all.

Again, this ordinance published in 1883, has been ruled by Judge Aldrich to be chiefly " a continuation " of the ordinance passed December 23rd, 1876, (see Appendix, No. 6), in more words but to the same purport. And finally, we come to it in its form as passed January 4, 1862, in which the sole jurisdiction over public speaking in Boston was declared to be under the control of " the mayor and board of aldermen," as already noticed. Thus, in the brief space of twenty years, the Boston City Council assumes to have begun and completed THE ASTOUNDING REVOLUTION,

OF ROBBING MILLIONS OF CITIZENS OF THEIR SCRIPTURAL AND CONSTITUTIONAL RIGHTS OF FREE PUBLIC SPEECH ON COMMON LANDS OF BOSTON, AND GIVING THE ABSOLUTE AND ULTIMATE CONTROL OF PUBLIC SPEECH IN THIS CITY, FIRST TO THIRTEEN MEN; SECOND TO EIGHT MEN; AND FINALLY TO ONE MAN!!

The sole controversy of the city, county, and State officials with Wm. F. Davis, has grown out of the fact that this citizen *does not believe, and never has believed for a moment*, that the City Council of Boston *can lawfully do* what they say they have done by this gag-by-law.

He has therefore stood from the first in an attitude of loyal obedience to the supreme Gospel commission, and to the great Charters of Christian liberty contained in the National and State Bills of Rights, and has utterly refused, and still refuses, to recognize the legitimacy of the insurrectionary gag-by-law, under which the prosecution and persecution of ministers of Christ has been going on in Boston for several years.

He does not say that *he cannot conceive* that the free public preaching of the Gospel in Boston *can be suppressed*.

But he does not believe that it can be suppressed without *suppressing Boston*; and until he is convinced that God means to wipe out this city, as he did Sodom, No, and Nineveh, it is vain to try to persuade him to take ship for Tarshish.

"But why do you not ask a permit from Mayor O'Brien?" cry hundreds of pedlers of old chestnuts.

Several thousand good answers may be given to this question. Let two-score suffice for this place.



I don't "ask a permit from Mayor O'Brien to preach :"

1. Because Mayor O'Brien is not my God ; and is in no wise competent to authorize any man to do the work of a Christian Evangelist. The assumption that Mayor O'Brien *has* any such authority as this ordinance implies, is profane to the verge of blasphemy.

2. Because I have a command from Jehovah God, the Everlasting Father, the most Blessed Redeemer, the Eternal Spirit of Truth, which command I have been obeying for thirty years, according to the grace given, and, God helping, shall continue to obey as long as I live. Gal. 1 : 15, 16 ; Eph. 4 : 1-15.

3. Because *Jehovah God is alone competent to authorize* a person to publish the Gospel. Deuteronomy 13 : 1-11 ; Jeremiah 23 : 1-40 ; Psalm 105 : 1-15 ; Matthew 28 : 19 and 20 ; John 15 : 16 ; 17 : 18-21 ; 1 Corinthians 9 : 16.

4. Because *Mayor O'Brien has no lawful, civil or religious jurisdiction over the preaching* of one of Christ's ministers, much less over all of them, *on public grounds of Boston*. Knowing this, I will not play the fool by asking him for an authority which he has not got, never has had, and never can have.

5. Because the authority which the City Council pretend, through their gag-by-law, to have invested in Mayor O'Brien, is not, never has been, and never will be theirs. They cannot give him what is not theirs. Nor have they any power by which they can possess themselves of it. That authority is too high up for them to handle.

6. Because Mayor O'Brien cannot give a permit to

preach the Gospel in places of free public resort in Boston, which would be worth in good law or Gospel the paper it might be written on. Let nothing be wasted.

7. Because I am a free Christian citizen of Massachusetts, and mean to continue so, until satisfied that God would have me shake off the dust of my feet against the old Bay State for a testimony against her in the day of judgment.

8. Because the Gospel must be left free in Boston, or the citizens of Boston will become slaves.

9. Because I am a law-abiding citizen.

10. Because the Boston By-Law, Section 11, Chapter 42, Revised Ordinances of Boston 1885, as far as it has any power, both in letter and in spirit, in theory and in practice, as it stands in print, and as it has been interpreted by the courts of this State, is subversive of the most sacred liberties, and at war with the most solemn duties of every Christian citizen of Massachusetts. These liberties and duties I am pledged to defend.

11. Because I will not be a deliberate liar at anybody's or manybodies' solicitation, for the sake of becoming Mayor O'Brien's licentiate.

12. Because I am afraid to. I judge no other man's conscience in this matter, but honestly declare my own.

13. Because I could not ask such a permit without sinning presumptuously.

14. Because I know of no promise of forgiveness for presumptuous sinning, and I dare not become guilty of the unpardonable sin.

15. For the same reason that I do not "ask a permit from Mayor O'Brien" to love and obey my God, to

hallow God's Name and His Day, to honor my earthly parents, to love my family, kindred, neighbors, countrymen, and all other human beings.

16. For the same reason that I do not "ask a permit from Mayor O'Brien" to hate idolatry, man-worship, profanity, prize-fighting, desecration of the Lord's Day, bearing false witness against my neighbor, lying, stealing, adultery, rum-selling, covetousness, gambling and murder.

17. Because, even if it could be proved that the City Council passed this gag-by-law "ignorantly in unbelief," that would not justify me in complacently acquiescing in it, knowing, as I cannot honestly keep knowing, that it is directly, explicitly, and fundamentally repugnant to our National and State Bills of Rights and to our BIBLE.

18. Because I know, and can prove, whatever anybody else thinks or says to the contrary, that the ordinance requiring such a permit is a MONSTROUS FRAUD, and those who defend it, whether they realize it or not, are worse *conspirators* against the Constitutional rights of all the citizens than were the Southern Secession Confederacy of 1861.

19. Because, under any articulate theory of our United States Republican government, such a power as is claimed by the City Council under this ordinance, must first, before they attempted to enforce it against legal remonstrance, have been proved by them to have been conveyed to and vested in them by explicit Constitutional and Statute law. That proof has never been furnished. It never will be. It does not exist. It never existed.

20. Because all such power as is claimed by the Boston City Council under its gag-by-law, is expressly declared by the Constitutions of the Nation and the State, to be above and beyond the reach of the people's elective servants.

21. Because Article I of the National Bill of Rights is: "Congress shall make no law respecting *an establishment of religion*, or *prohibiting the free exercise thereof*; or *abridging the freedom of speech* or of the press; or the right of the people freely to assemble, and to petition the government for a redress of grievances."

22. Because Chief Justice Story, in his Exposition of the Constitution of the United States, long used, and for aught I know still used, as a legal text-book in Harvard College,\* says: It is plain, then, that this amendment imports no more than that every man shall have a right to *speak, write, and print his opinions* upon any subject whatsoever, *without any prior restraint*, so always that he doth not injure any other person in his rights, property, or personal reputation; and so always that he doth not thereby disturb the public peace, or attempt to subvert the government.

*It is in fact designed to guard against those abuses of power by which, in some foreign governments, men are not permitted to speak upon political subjects, or to write or publish anything without the express license of the government for that purpose.*

23. Because the Constitution of Massachusetts says, Article II, Bill of Rights, "*It is the right, as well as the*

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\* Story on the Constitution, p. 262.

*duty of all men in society, publicly, and at stated seasons, to worship the SUPREME BEING, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship."*

24. Because, if the servants of the people in their highest capacity are forbidden by the highest symbols in which National and State law are published to meddle with citizens in their peaceable worship of God, whether public or private, it is outrageous malfeasance for these servants in their municipal, or lowest legislative capacity, to invade these sacred charters, as the Boston City Council has done, in passing their gag-by-law, and for other servants of the people to sanction that invasion, as all the courts of Massachusetts have done, in prosecuting, fining, and imprisoning preachers under that iniquitous by-law. Psalm 50 : 16-23.

25. Because the City Council of Boston has more right to declare war on England, and to coin, and print, and issue gold and silver, and nickel, and copper, and paper money, and to enforce their fiats in these matters against loyal and protesting Massachusetts citizens, than to pass and to attempt to enforce the gag-law against gospel preachers in Boston. But they have not the shade of the shadow of a right to commit either or any of these crimes, lesser or greater.

26. Because all the prosecutions carried on by the city and State officials under this ordinance, during the

time since its passage in its earliest form until now, have been illegal, tyrannical, and malicious persecutions against law-abiding citizens of the United States.

I will not indorse the dragonnades of a Romanizing, rumselling City Council, by asking for a permit to preach from its Mayor and Chairman.

27. Neither will I be a "dumb dog" when I see a gang of garroters let loose upon all the Christian citizens of this Commonwealth.

How could I then warn the citizens of the enemy, if I slavishly surrender to the enemy and put on their uniform?

28. Because, if *Mayor O'Brien were a law-abiding citizen*, I should have this permit, in the only sense in which that permit is good for anything to me, without asking for it.

For in that case he would honor the Constitution, and not only sanction a free public gospel ministry, but resist, to his utmost, every attempt to interfere with the free publication of the gospel. But Mayor O'Brien is to-day the official head of a satanic conspiracy against the highest weal of our Commonwealth.

29. Because I have known and shown that I cannot ask such a permit without becoming a willing partner in this worst of conspiracies against the Commonwealth. "If sinners entice thee, consent thou not."

30. For the same reason that I do not ask a permit of Mayor O'Brien to go upon Boston Common.

The City Council have just as much right in law and gospel to insist on citizens exhibiting a prior special permit from the Mayor for *walking*, as for *talking* on

Boston Common; for being there *unshackled* and *unhandcuffed*, as *ungaged*.

31. Because the claim that men must have a prior Mayor's permit to speak on Boston Common grounds has behind it the assumption that all our citizens are the slaves of an autocratic junketing City Council. I protest against this insult to free-born United States citizens. Away with your gag!

32. Because it is intolerable that the lost power to strangle public servants of Christ, in Italy, in Rome, and in France, which has been stripped of from the creature of the Jesuits who sits on the Tiber, and cannot be enforced even over their own New York priest, Edward McGlynn, should, after more than a century of freedom, be vested in any Roman Catholic or Protestant Mayor of Boston, the Cradle of Liberty! Tell it not at Rome; publish it not in Spain!

33. Because it is my duty, instead, to warn the Boston City Council to stop trying to loosen the corner stones of Bunker Hill Monument, Massachusetts State House, and the National Capitol.

34. Because, since I must choose, I would rather be bound with Christ, with Paul, and with Bunyan, than go free with Barabbas, and with the garotters of the gag-by-law.

35. Because, all the pretense about the necessity, from considerations of public order, of a prior permit for preachers of the Gospel from Mayor O'Brien, is mere cayenne pepper thrown before the stove, quick lime thrown into the air, or morphine sponge thrust under the nose by burglars, or their "fences" and

dupes, for the blinding of simple folk, whom these banditti are bent on ridding of all honest watch-dogs, until they have buried all our liberties out of sight and memory. Thieves! Thieves!! Thieves!!!

Governor Ames! Here is work for the police, to clear our common lands of City Council gagging bands.

36. Because, I object to having the great dome of our free Republican government pulled down upon the heads of the people by the alien powers which are driving their rat-holes under the twin pillars of *free public Gospel preaching*, and *free public school teaching*, on which that dome was firmly set by our forefathers. It was not for this that my grandfather's father left his blood-tracks on the frozen ground of Valley Forge.

37. Because, I won't sell every Massachusetts citizen's immemorial rights in Boston Common, in our State House, and in the Capitol at Washington, for a pedler's annual license from Mayor O'Brien.

My copy of the National and State Bills of Rights, and of the Bible, are not yet nibbled into illegible bits of paper, and old rags, rags, rags, by European wharf rats! rats!! rats!!!

38. Because it is my business, instead of taking my stand, as this question invites me to, where I know the lightning is surest to strike, to warn the City Council, and all their fellow-conspirators in this iniquity, of the fate of Uzzah and of Uzziah. 2 Sam. 6: 6, 7; 2 Chron. 26: 16-21. Take your hands off the ark, City Councillors! Stand away from the altar, Sullivan's backers!



39. Because I care least of all what despotic outrages the people's overreaching servants perpetrate on me personally. The worst *you* can do, is the best that can befall *me*. I have learned WHO is to be feared.

Nor are your raids on the people's pockets matters of supreme moment. "The needy shall not always be forgotten; the expectation of the poor shall not perish forever," If you consider that, to vote yourselves high salaries and costly indulgences, and make the people pay for it, is official glory, continue to help yourselves to the people's money until they know and care enough to provide themselves with more faithful stewards. But as a free and unsalaried public servant, and private citizen of Masssachusetts, I have the *right*, and it is my *duty*, to warn you to stop trying to override the Constitutional rights of the whole people, and quit trying to cut the stars out of our nation's flag.

40. "But," observes a kind-hearted practitioner at the Boston Bar, "what good will your testimony do? The people of Boston will let you rot in prison, and the pessmires carry off your carcass piece-meal through the gratings of the door, before they will heed your testimony."

Is that so? Well, then! Begone with your infamous permit! Make room for the honest pessmires! "For I know that my Redeemer liveth, and He shall stand at the latter day upon the earth.

"After I shall awake; though this body be destroyed, yet out of my flesh shall I see God.

"Whom I shall see for myself, and mine eyes shall

behold, and not a stranger. My reins within me are consumed with earnest desire for that day.

“But ye should say, Why persecute we him, seeing the root of the matter is found in me?

“Be ye afraid of the sword: for wrath bringeth the punishments of the sword, that ye may know that there is a judgment.” Job 19: 25-29.

## CHAPTER II.

### HISTORY OF ATTEMPTS TO APPLY THE GAG.

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It is getting to be well known that Boston liquor-sellers, abetted by Jesuitical intrigue, not content with drugging and plundering the workingmen and their families, emptying church buildings, shutting up the common schools, crowding to repletion tenement-houses, almshouses, houses of correction, jails, courts, of justice, prisons, insane asylums, and streets, with imbeciles, ruffians, and idiots, turning the Lord's Day into a howling pandemonium, enslaving the Republican party, corrupting the ballot, and killing outright about 7,500 Boston citizens a year, has at last *deliberately undertaken the entire suppression of free public preaching of the Gospel in Boston.*\*

Nevertheless rum and Rome could have no power at all, but by the consent or by the indifference of the people.

The saloonocracy of Boston, manipulated by papal craft, have daringly, yet stealthily, attempted the subversion of the free public preaching of the Gospel, by a *perversion of the civil government to that end, in all its functions, legislative, executive, and judicial.*

---

\*Some matter published by the writer two years ago in Record of the Christian Mission, III. 1, is here used, though altered, and wholly re-written.

Twenty-one years ago, Wendell Phillips, our "incorruptible tribune of the people," asserted before a mammoth audience, in Tremont Temple, that for twenty years the Mayor and Aldermen of Boston had been chiefly a standing committee of the grog-shops and brothels.

But it is doubtful whether even he was then aware how large a "job" that standing committee had undertaken.

On the 4th of January, 1862, four years before Phillips' speech, the drink-dragon slyly threw a Romanist coil around Boston, in the form of a city ordinance, as follows: "Sec. 11. No person shall deliver any sermon, lecture, address, or discourse on the Common, Public Garden, public squares, or common lands of the city, without permission of the Mayor and Aldermen."

That ordinance was not only couched in language opposed to the express command in our Gospel Commission; but was also in explicit daring defiance of the most sacred guaranties of the United States Constitution and Bill of Rights, and of the Massachusetts Constitution and Bill of Rights. *But it formulated the quintessence of liquor and papal doctrines of personal liberty.*

Does it therefore take the lawful precedence of the everlasting Gospel of God, and of the world-venerated Constitutions of the United States and of Massachusetts, in the eyes of Boston citizens?

But when enacted, as was shown at the trial before Judge Aldrich, 7, 2, 1885, that ordinance was not published to the people, nor recorded in the Clerk's office of the Superior Court, as required by statute law. Nor

were the successive revisions of the ordinance which were noticed in the preceding chapter conformed to statute and ordinance direction in the mode of their enactment. The legally prescribed safeguards touching the right *manner* of ordaining city by-laws, so that they may have due legal dignity, authority, and publicity, were despised in the enactment and re-enactment of this ordinance, even as the constitutional rights of all the citizens were trampled under foot by the *matter* of the ordinance itself. Smuggled into the City Hall by the enemies of all righteousness, "a by-law" destined to become a by-word, there it lay, silent and passive, like a dynamite bomb, ready to be exploded whenever the conspirators of the Vatican and of the saloon decided to act. Because these conspirators were represented in the City Council, shall their conspiracy against Christians go unrebuked?

On returning from his third missionary tour among spiritually neglected districts of Michigan, in the Spring of 1882, the writer began the prosecution of a long-cherished plan of free Gospel ministration to the common people of Boston, on common lands of the city, where all have the right to freely assemble.

But first, early in the 4th month, he called on the chief of Boston police, and asked, "Does the City of Boston construe the free public preaching of the Gospel on the public grounds of the city as a breach of the peace?"

The chief sent the questioner to the police commissioners. These gentlemen, when asked the same question, desired time to consult the city solicitor.

After thrice postponing their answer, promised for a

given time, the commissioners replied : “ We have conferred with the city solicitor, and find we have no authority to grant you a permit to preach on the Common or any other public grounds of the city.”

To this the writer replied, “ Gentlemen, you evade my question. You are not asked for a permit to preach ; but *whether the City of Boston assumes an attitude of hostility towards the free public preaching of the Gospel*, on Boston Common and public parks, where the people have the right to freely assemble. I hold my commission from the only competent Authority, and shall exercise it.”

After some further parleying, the missionary again asked : “ Will you be kind enough to tell me plainly whether you construe the free public preaching of the Gospel in Boston as a breach of the peace, or not? Will you, or will you not, instruct the policemen to break up an orderly Gospel meeting on public grounds, which does not obstruct any thoroughfare of the city, nor trespass on private rights?”

“ *Oh, no!*” promptly responded the chairman, “ *we should never do that.*”

The missionary withdrew, and during five ensuing months held open-air meetings at the North End in Boston, in Monument Square, Charlestown, on Barnum’s circus-grounds, for the circus men, women, and boys, on Somerville Heights, and on Boston Common. During the 6th, 7th, and 8th months, he conducted meetings every Lord’s-day afternoon on the Common, and no policeman interfered with any of the meetings, nor intimated that a seditious ordinance was in existence to furnish any pretext for such interference. Shall we accuse

the Boston city solicitor, the police commissioners, and the policemen, of *ignorance* of that unconstitutional by-law during the Summer of 1882 ; or credit them with a recognition of its *mischievousness*, and a hesitation to pull down the fabric of government about their ears, by attempting to enforce a revolutionary act? For one, I must choose the latter alternative.

Judge Aldrich has declared *that ordinance was never obsolete*. It can be proved that Boston officers *were no ignorant* of the presence of that package of legal dynamite in city-government precincts.

Nobody believes that the hand of any jurist or legislator in Boston, *as such*, manufactured that dynamite, or that the hand of any policeman, *as such*, finally threw that bomb.

That by-law was NOT "enacted in the interest of order." It is NOT "a police regulation," in any ordinary or legitimate use of language. It *is* adapted to reduce all civil order to uncivil chaos, and to destroy every object which legitimate police regulations conserve.

*The police of Boston, as a rule*, have greatly desired to spare the city the unspeakable disgrace and the dreadful demoralization inseparable from decisive attempts to enforce that essentially wicked and seditious ordinance.

But the liquor-ring was insatiate. The leopard of Ultramontaniam ravined.

Was whiskey to have the name of ruling Boston and miss any of the game? Was Rome's boast of her dominion over Boston to be perpetually bridled by free public worship? Rumocracy and the Inquisition forbid !

"I gave the mouse a hole," say the Spaniards, "and he is become my heir !"

The citizens of Boston have licensed the leopards of Europe, and quartered them within the sheep-folds of New England, and these ravagers very naturally insist that no honest Shepherd's dog shall walk abroad in Boston, without a muzzle on his mouth ; unless, indeed, his throat be held firmly at one end by the license-noose of a strong cord, the other end of which is in their paws.

"Governor Ames, of Massachusetts, has sent a gift of \$1,000.00 to President Cahill of the Jesuit College at Worcester, Mass."\* Why should the Jesuits longer hesitate to begin their hunt for heretics in this State? Once they have cleared the public grounds and highways of free public preachers, by a city ordinance which pliant judges and attorneys will endorse, though it spits on the portraits of the august framers of the Declaration of Independence and of the great Bills of Rights, they can make plain sailing of boarding, gutting, and scuttling the separate sectarian corporations one by one ; for they have *good Statute law all ready at hand for that purpose*, as soon as they want to use it. "*All corporate powers granted to any religious corporation, shall be subject to alteration or repeal by the general court.*" Public Statutes, Chapter 38, sec. 51.

The General Court has been appealed to to annul this iniquitous gag-by-law,† by the Evangelical Alliance, representing the largest union of non-Romish

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\* *Boston Journal*, 9, 23, 1887.

† All by-laws, made by . . . city government, shall be subject, at all times, to be annulled by the General Court." Last clause Art. II, Amendments to Massachusetts Constitution. Public Statutes, p. 37.



churches in Massachusetts. It has *not* heeded that petition.

All the law Courts of Massachusetts have *bowed to this gag-by-law*. Does anybody suppose that Rome is *passively* interested in this active or silent betrayal of the most sacred trusts ever committed to human government, by our public servants, acting in their official legal capacity?

Do the people of Beacon Hill and of Back Bay, who love to call themselves "Protestants," imagine that the courts have driven a rather noisy wild goose, caught on one of Mayor O'Brien's private preserves called the Common, into one of his private pens called Suffolk Jail, and that that is all there is anyway to this fuss about preaching on the Common?

Have it so, if you will, so far as the *preacher* is concerned. "The sluggard is wiser in his own conceit than seven men that can render a reason." Albeit cackling geese once saved Rome, and any preacher would richly merit to be thought an idiot who would toil five seasons for *human* reward such as mine has been at your hands, and such as, I may say in all sincerity, I foresaw it probably would be, when I began. But, regardless of the writer, who of you is ignorant, that the one consistent endeavor of Jesuitism, from the date of its origin in 1541, has been to expel Christianity from the earth, and to substitute Romanism in its stead, as the universal religion? Who of you can plead the baby act when asked of alcohol's power to destroy?

Which of you all, so well satisfied now with your secular gains and Sunday club that you reck not of the great unchurched, hungry throng without, is not aware

that the histories of America, England, Holland, Spain, France, Italy, Africa, China and Japan, during the past 340 years, prove, by facts of unvarying uniformity, the unchanging character of that treacherous apostacy, into the hands of whose leaders, leagued now with the whiskey ring, as always with the most corrupt faction, you have decided by your courts you will commit the publication of God's gospel in Boston? History shows us that this is to invite the renewal in this country and in the nineteenth century of the falsehoods, conspiracies, flatteries, briberies, threats, forgeries, conflagrations, plots, tortures, assassinations, poisonings, stabbings, stranglings, cold-blooded butcheries, treason, wholesale massacres, and civil and foreign wars, which, during centuries past, have devastated the peoples who have hitherto fondled, or been fondled by, Alcohol and Romanism.

Dare you doubt that Boston officials, in officially committing this city to the policy of Jesuitism, in league with the saloon, has delivered over 400,000 souls to reenact the hideous horrors of centuries past of ecclesiastical tyranny and of the tortures of the drink-demon?

Let the leopard of to-day say if his spot is not the spot of the Spanish Inquisition, of the massacre of St. Bartholomew, of the Dragonnades in France, and of the poisoners in all ages. A recent number of the *Western Watchman*, a Roman Catholic journal, published in St. Louis, Mo., says: "Protestantism! We would draw and quarter it. We would impale it, and hang it up for crows' nests. We would tear it with pincers, and fire it with hot irons. We would fill it with molten lead,

and sink it in hell-fire a hundred fathoms deep.”\* Every morning and evening the fresh tragedies of the saloons are spread out by the newspapers for you to contemplate in dissolving views of ghastly horror. Why should these twin rings of gin and Jesuitism doubt their united power to throttle gospel ministers? Burrowing night and day, they have tunnelled their roads from the saloons and cells to the City Hall, undermining numberless homes, and even dispersing public schools in their progress. Their horrible party sorceries, transforming our earlier democracy and republicanism into the present *demon-o-crazy*, and *rum-publi-Cain-ism*, and driving both of the corrupted old parties in one span, yoked to a monstrous beer-wagon, blessed by ecclesiastics who are fonder of cursing than of blessing, and of drinking than of praying, left little else besides the ministers of Christ to be conquered.

When God is ready to set Boston as Sodom and Gomorrah, as Admah and Zeboim, then will the Pope and the saloon silence the free public proclamation of the gospel in Boston, and not till then.

At the close of the summer of 1882, the writer resumed missionary labor in the pineries, among the unevangelized farming districts, and in the lumber and mining cities and villages of the Lake States. In 1883 he was busied with a variety of duties, which left him no time for open-air meetings in Boston.

But in 1884, on the first Lord's-day of the seventh month, he resumed preaching on the Common. He had heard of the outrageous assault by a policeman on

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\*The Converted Catholic, October, 1887, p. 294.

Brother Abijah Hall in the summer of 1883, as that servant of God was distributing tracts and preaching Christ on the Lord's-day morning, in front of the Boston and Providence R. R. station. He was therefore prepared to expect similar treatment from the ministers of anti-Christ at his first open-air service that year.

But there was good attendance, good attention, and no interruption.

On the afternoon of the following Lord's-day a still larger assembly participated in divine worship at the same place. No one molested or tried to make us afraid.

On the third Lord's-day, the twentieth of the seventh month, a policeman interrupted the opening services, and demanded whether the preacher had "a permit from the Common Committee." He replied: "I have a command from a Higher Authority;" and read Matt. 28: 19, 20, and Acts 1: 8, in response to the officer's desire that the order be exhibited.

The policeman declined to recognize the Authority quoted; whereupon the preacher, refusing to see anything in a blue coat, brass buttons, and club, to warrant the paid guardian of the peace in committing the greatest possible breach of the public peace, asked the policeman if *he* had "documentary warrant from *any* source for disturbing a peaceable religious assembly?"

The policeman hastened away to the station-house for fresh instructions, and soon came back and ordered the preacher to go with him, saying that the lieutenant of the station so directed. The preacher replied: "I refuse to be driven off this Common like a dog. If thou meanest to arrest me, arrest me." The policeman

replied, "I do arrest you!" taking hold of his arm; "Come with me!" The preacher stepped down from the seat, and continued the reading of the Word of God, and preaching to a moving audience of hundreds, all the way to the station-house. Other hundreds who remained were addressed by brethren who occupied the place which he vacated.

At the station, the preacher was shown the gag-by-law and discharged.

He accepted an invitation to continue the meeting in an adjacent hall, addressed the waiting throng in the street briefly from the steps of the police station, and as many of them as could enter the hall did so, where an excellent meeting was held.

The following morning the preacher repaired to the law-office of a beloved college class-mate, and diligently studied the gag-by-law sec. 11, chapter 37, Revised Ordinances of Boston, 1883, text and context. He looked up "*the City Charter*" and the "*power to pass police regulations.*" He studied the Massachusetts Constitution, Preamble, Bill of Rights, and all. He studied the U. S. Constitution, Preamble, Bill of Rights, and all; reviewing his college studies and studying fresh matter. At the end of two weeks of careful and painstaking investigation, he was satisfied that the attack on the Christian Liberties of Boston citizens, made under cover of the gag-by-law which Lieutenant Lambert of Station 4 had pointed out to him, was in reality an attack upon the highest and most venerable legal Symbols of our National and State government, and upon the rights which they recognize as inalienably inhering in every free citizen.

He saw plainly, what any honest man who will read and dare to think for himself may see, that the gag-by-law is totally repugnant to God's glorious Gospel, and to the National and State Bills of Rights. He saw that there is not room in the city for THEM, if *that* be obeyed. He knew his duty. He set the ordinance at naught.

The Lord's-day immediately following the sham arrest, the preacher held services at the Union Athletic Grounds, on Back Bay, in Boston, by invitation of the Boston W. C. T. Union, who hired the grounds and advertised the meeting. In reply to their question as to whether they should do the same for the next Lord's-day, he said: "Of course, the Union will act their judgment; but, God willing, I shall be on the Common next Lord's-day."

Accordingly, on the first Lord's-day in the 8th month, the writer resumed free public preaching on Boston Common, using the same Scripture and sermon prepared for the former service, which he had begun to use when disturbed by the police two weeks before. A large audience was present, everything was orderly, and though seven policemen were on the grounds they were all law-abiding, and refrained from committing any breach of the peace.

The writer continued to conduct religious services at the same place on the Common throughout that summer on the afternoons of the Lord's-day, without further interruption. Policemen were present during every meeting, but they behaved as well as any citizens.

Meanwhile, during this summer, various persons

applied to the committee on the Common for "permission" to preach there, and were refused.

*Everybody who applied was treated with consistent contemptuous silence.* In this case, the patient people were finally informed by the would-be usurpers of the inalienable right of free public speech, that silence does *not* give consent.

Among others, contrary to the writer's judgment, wish, and advice, eight reputable citizens of Boston applied for a permission to be given to Wm. F. Davis to conduct gospel meetings on Boston Common. As in the other cases, the application was treated with silent contempt.

Finally, after the committee had been pressed by the petitioners for an answer, the public were curtly informed, through the newspapers, that the committee voted to refuse this application, and the committee also published a more *general* decision: "No requests for permission to preach on the Common on Sundays will in future be granted." \*

*This official publication, three years ago, of the purpose of the very men who framed what Judge Aldrich construed to be "a continuation" of the earlier gag, is documentary public proof that by the present City Council, as by that in 1862, the object in framing that by-law, was the complete gagging of gospel ministers on all the public lands of Boston, whether those ministers were clergy or laymen.*

What an infantile *innocence of understanding* was displayed by Judge Aldrich, nearly a year after all this

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\* *Boston Advertiser*, Aug. 4, 1884.

had been bruited abroad in the newspapers, when, rising in his own court-room, with these facts spread out beneath his nose, he said to the jury, and to all present: "The *idea* that in the Commonwealth of Massachusetts *such* a question—that the freedom of the gospel could be infringed,—could be *raised* or *suggested*, *must be a surprise to all!*"

And *then* he proceeded to *endorse* the *very identical wholesale gag-by-law*, which had been proved before his eyes and in his ears to be just that incredibly outrageous infringement, saying: "*I deem it my duty to say that the city had the right to pass such an ordinance.*"

For his part, the writer dared not become a follower of those "That make a man an offender for a word, and lay a snare for him that reproveth in the gate, and turn aside the just for a thing of naught." *Therefore he continued to conduct gospel services on afternoons of the Lord's-days throughout the remainder of that summer without further interruption.*

In the following season, 1885, on returning from missionary labors among the spiritually neglected districts of the North-west, the writer went forth again on the 17th day of the 5th month upon Boston Common to preach the gospel. He found the good work extending.

Besides Brother H. L. Hastings, preacher, and publisher of *The Christian*, who went with him, a corps from the Salvation Army, the Y. M. C. Association with Pastor A. J. Gordon for their preacher, and several other persons, busied themselves that afternoon in breaking the Bread of Life to the spiritually hungry, who were present in large numbers.



For these acts of obedience to Christ, and of illustration of the Christian Liberty of Boston citizens, which all the armies, navies, treasuries, and officers of the United states and of Massachusetts are pledged, if need be, to defend against invasion by the whole world, four days later, on the 21st day of the 5th month, eight persons were arraigned before Judge Adams in the central Boston Police Court, criminal session, and accused of preaching without a license, and "against the peace of the Commonwealth." Seven were declared guilty by the Judge, and fined \$10.00 each; although the writer insisted that the *free* public preaching of the gospel is the corner-stone of the "peace of the Commonwealth." The testimony also of the police, who had been forced by Judge Adams to swear out the complaints, and to swear away the rights of law-abiding citizens, given in open court, proved that the visible influence of the preaching on the Common during the former years had been decidedly influential for good upon the thousands who had attended the services. Therefore, the *ordinance* which had been formed to destroy free public worship in Boston, was shown to be "against the peace of the Commonwealth," by the very witnesses employed to enforce the ordinance, and in the very trial where the preachers were condemned under the ordinance! Bro. Hastings was, when called, thrust into the prisoner's dock with the common drunkards and drabs,—as we all ought to have been, if legally held for crime. But the judge made up for the outward show of respect to most of the preachers who were not put into the dock, and also to Bro. Hastings, who was let out of the dock after a little, by fining us ten times

as much for preaching God's gospel without money and without price as at the same court session the common drunkards were fined for their crime. We appealed, and were required to give bonds in the sum of \$100.00 apiece, and two sureties on each bond, that we would appear at the next term of the Superior Court to prosecute our appeal.

Lawyer J. F. Pickering appeared as counsel for H. L. Hastings at this trial, and pleaded the unconstitutionality of the ordinance; a plea which he anticipated, as it proved correctly, the incompetence of Judge Adams to hear.

Judge Adams said, whether ignorantly or craftily, or both, concerning the ordinance: "*It is not, perhaps, intended to restrain persons in cases of this sort.*"

"Perhaps," if Judge Adams had spoken with entire frankness, he *would* have said: *We only expected to catch these poor preachers who represent no one in particular, but Jesus Christ and HIM CRUCIFIED.* By our legal twists and turns we could easily braid them into mats for prison officials. We didn't expect Phillips Brooks, or J. L. Withrow, to be out on the Common preaching, and we are glad they were not.

*We didn't expect to catch Pastor Gordon; but we open our net, and behold he is in it, with despised Salvationists and Davis.*

*We hardly expected an editor of H. L. Hastings' stock of editorial quills; but we will soon dock him. On the whole, we are the ones who have been caught. So to get ourselves out of our own net in which we have been wriggling these three days, we will not destroy and throw away the net. Never! We will break a few*

meshes in it, and crawl out, *even though we have to falsify the record.*

Judge Adams *did not talk this straight out* in open court. We scarcely expected he would. He said: "This is not a crime involving moral turpitude. It has been made a crime by city ordinance. It has been deemed for a long time proper by the Council of the City to exercise due and proper control over the Common and other public squares in this city; and in consequence of that belief, ordinances were passed many years ago, and among them the one under which this complaint is drawn, and that is, that no person shall deliver a sermon, address, or discourse on the Common or other public grounds, without a permit from the city government.

"Of course we can see all the propriety of that, if the City Council have the authority to pass the act.

"It is not, perhaps, intended to restrain persons in cases of this sort; and perhaps if this class of cases only had sprung up under that enactment, there would have been no trouble. But under our system all classes of people are subject to the same law, subject to the same restraint, and as many objectionable people do go on the Common and make all sorts of harangues, tending to disturb the peace and corrupt the community, this ordinance was deemed necessary. And if any person wishes to go on the Common for such purposes as are involved in this case, he has simply to call on the city to get permission to do so."\* This plea was of course utterly worthless as a legal argument; unless the Judge was

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\* *Boston Evening Traveller*, 5, 21, 1885.

able to substitute for his hypothetical "*if the City Council have the authority to pass the act,*" on which the whole argument hinges, solid and irrefragable evidence and proof *that the city HAD the authority to pass the act, what that authority is, and that they really did pass the act in the exercise of that authority.* But the requisite evidence and proof germane to the question all establish a theory the exact opposite of the guess of Judge Adams, so that his argument, as an argument, is proved to be false, being based on a supposition contrary to ascertained fact. *His allegations of fact were also falsehoods.*

The ordinance was *not* passed, as he alleged, to furnish due and needful "restraint," because, "as many objectionable people do go on the Common and make all sorts of harangues tending to disturb the peace and corrupt the community, this ordinance was deemed necessary."

Judge Adams knew, if qualified for his position, that the *statutes* contain abundant and adequate provision for the legal discipline of "objectionable people" who, he says, "do go on the Common and make all sorts of harangues, tending to disturb the peace and corrupt the community." He knows that *brawling, obscenity, profanity, libel, black-mail, blasphemy* and *rioting*, are all statutable crimes, for which, whoever is guilty of them may be morally and legally dealt with, whether committed before witnesses on the Common, or elsewhere.

He knows that there is a statute provided for all and for each of these "objectionable people" whenever they "do go on the Common and make" so much as *one* of these "sorts of harangues tending to disturb the peace

and corrupt the community." I commend to his notice, for example, this, which may be found in Public Statutes, chapter 207 : "Sect. 19. Whoever wilfully blasphemes the holy name of God, by denying, cursing, or contumeliously reproaching God, his creation, government, or final judging of the world, or by cursing or contumeliously reproaching Jesus Christ, or the Holy Ghost, or by cursing or contumeliously reproaching the holy word of God contained in the Holy Scriptures, or exposing them to contempt and ridicule, shall be punished by imprisonment in the State prison not exceeding two years, or in the jail not exceeding one year, or by fine not exceeding three hundred dollars, and may also be bound to good behavior."

Would it be difficult for Judge Adams to signalize his interest in maintaining "the public peace" by instructing policemen to bring before him men found by them in public places of the city guilty of violating *this statute*, if he were really zealous for the suppression of persons whose talk tends to "corrupt the community"? No! citizens. This gag-by-law was aimed at gospel ministers chiefly; although in the first instance a temperance lecturer was made the occasion of its passage. The language of the ordinance proves it. The history of attempts to apply it proves it.

The ordinance opens with a *general prohibition of gospel preaching*, limited only by the absolute will of the Mayor. "No person, without the permission of the Mayor, shall deliver a sermon, etc." Everybody knows that "a sermon" is, in common English speech, a *religious* discourse. Everybody knows that Christianity as set forth in the Holy Scriptures, and in lives

conformed to the Truth there revealed, is the only true religion.

The very language of this ordinance, therefore, shows that it was a weapon formed against the glorious Gospel of God, with which the enemies of Christ in the City Council hoped to drive the ministers of Christ from all public lands in Boston.

The rest of the words descriptive of acts prohibited by the ordinance, "lecture, address, or discourse," *might* apply to preaching the gospel, or they might apply to other utterances, good, bad, or indifferent; and that is the objection to the ordinance, that it treats the most holy utterances as if they were the most profane. And its defenders insist that discrimination between the publication of Christianity and of Anarchy is impossible! *That claim is Anarchy!* So much for the face-value of the ordinance, which is *prima facie* evidence of the purpose of the City Councillors to destroy the free public preaching of God's gospel in Boston. Now for the fact of the application of the ordinance. All the evidence shows it to have been *constantly* and *consistently* employed for this purpose. Hence Judge Adams' allegation of the theory and of the fact concerning the general object of the by-law is proved an utter falsehood. Moreover, the by-law's diametrical oppugnance to our Constitution proves that it never can, while the Constitution stands, be anything but subversive of the public peace and of good order. It will be noticed that Judge Adams closed his plea for the gag with the remark: "If any person wishes to go on the Common for such purposes as are involved in this case, he has simply to call on the city to do so."

And then certain spaniels of the press, which live off the crumbs that fall from criminal-court benches, caught up the false scent, and yelped through the streets of the city that permits to speak on the Common "*were not granted because they were not asked.*"

Judge Adams *did not say outright* that all a preacher need do would be "to call on the city" for a permit to preach on the Common, *and the permit would be granted*, though the words "*to do so*" would fairly justify that inference, if spoken *by an ingenuous man to unsuspecting hearers.*

In the absence of any explanation by Judge Adams, people will form their own opinion of whether he intended to mislead hearers into accepting the falsehood published by the daily newspapers and believed ever since by numberless citizens, in consequence of his words.

If he intended that people should believe *as they believed in consequence of what he said*, knowing what he said to be false, dare he deny that he was a liar? *He could not know what he said to be true;* for it was false in the sense in which it was generally understood, and which after more than two years, so far as we are aware, he has never denied to be the true meaning of his words. How dared he so boldly affirm what he did not know?

If some one else "put him up" to say this, why doesn't he let the falsehood go home to its father?

However, this falsehood matched the rest of the plea. What use were it to try to rend it out and put honest new cloth in its place? The rent in this rotten case, in that event, would only be the greater.

On coming out of that court-room, H. L. Hastings

wrote and sent an application for a permit to preach on Boston Common to the committee on Boston Common, whose chairman, as appeared by the evidence in court of the complaining officers and witnesses for the city, was Jeremiah Mullane, a wholesale and retail rumseller on Federal Street.

Brother Hastings fared as well as the Y. M. C. Association, Thomas H. Dunham, John Gill, Henry C. Shepard, Abijah Hall, and many other applicants before him, had fared. *He did not get a permit.*

On being presented with the evidence that the Common Committee had not shown him any peculiar distinction in treating his application with contemptuous neglect, he drew a quill and wrote a three column article, which he published in *The Christian*, and which the W. C. T. Union of Boston scattered widely in separate form.

It was written on the first day of the 6th month, and, within five days, it had the effect of so convincing many people of the falsehood of what Judge Adams was understood to say, that to save the by-law from total wreck, the Common Committee reversed their engine, and for the first time since public attention was called to this matter in the 4th month of 1882, they began to administer this by-law as a *license law*, and not as a *prohibitory law*.

Who is so silly to suppose that now, at length, these City Councillors began to feel a pious concern for the evangelization of the more than 300,000 unchurched people, who are scattered abroad on common lands of Boston, on pleasant Lord's-days, as sheep having no shepherd; and that they, *therefore*, concluded "to per-



mit" a little preaching to be doled out to them, under the supervision of the Roman Catholic rumseller whom Boston put at the head of the Jesuit propaganda in charge of all public worship in our city in 1885?

The Boston Tammany Liquor Ring simply feared lest their Gospel drag-net would be swept clean away in the Superior Court, and themselves clean out of the public crib in the next City election.

Therefore, a messenger suddenly appears at the rooms of the Y. M. C. Association, saying, "Send up at once to the police commissioners' office for a permit to preach on the Common! It will be granted."

While the secretary halted, wondering what manner of strange and sudden conversion this might be, again a messenger appears, and still more urgently exhorts the Y. M. C. A. official to "send in an application for a permit, as it will really be granted." This had only the effect to deepen the secretary's astonishment, as he mused on the miraculous power of God, Who is able to change the leopard's spots, and wondered what masterly address of his own had been providentially used to pierce the joints of Ahab's harness, and lay the troubler of Israel low.

His reverie was broken by a third, and a still more urgent appeal from Pemberton Square, for him to apply at once for a permit to hold meetings on the Common, with renewed assurance that it would be granted.

He applied for a permit. A permit was instantaneously granted! Instead of prosecuting Pastor Gordon's appeal in the Superior Court, as they gave bonds

to do, the Y. M. C. A. paid his fine, and withdrew the case from the courts.

But the general public were not officially informed that members of the managing board of the Y. M. C. A. were also members of the "joint committee on the Common." If we knew more, we might be less hasty, sometimes, to condemn.

The police officer was not present at the *beginning* of that meeting addressed by Pastor Gordon on the 17th day of the previous month. Therefore he did not hear the valiant words of Brother A. R. Deming, Secretary of the Y. M. C. Association, which may now be safely published, who at the close of the meeting, which had been conducted by Hastings and Davis, stood upon a seat, and said to the assembled people, "*We have come out here to make a test case. We have come to try whether Christian citizens can be robbed of their constitutional rights to worship God freely on common grounds of Boston, in this city which is the cradle of liberty, by a city ordinance.*" Had the policeman heard that, undoubtedly Bro. Deming would also have been prosecuted. Or had others, who did hear it, known that Bro. Deming was serving a Board composed of diverse masters, perhaps they would cease to wonder that the case so openly begun was so quietly withdrawn.

The Y. M. C. A. worshipers, armed with a "permit," which tells them at what hour on the Lord's-day, on what bare spot on the parade-ground the Common Committee will tolerate their worship, procured Pastor A. J. Gordon, and held a meeting at the prescribed hour and place on the 7th day of the 6th month of 1885, being the Lord's-day. But the Secretary has his misgiv-

ings about the depth and thoroughness of the leopard's conversion, when officially informed that the permit would never have been given him, if the papers had not made such a fuss about it.

But meanwhile, prior to *this first muzzled free* meeting ever held by Boston *liberty-lovers*, for the public worship of God according to the *dictates* of their *own conscience*, under the dictation of *rum and Rome*, on the 24th day of the 5th month, on the Lord's-day, three days after the trial before Judge Adams, H. L. Hastings has been *freely* and *publicly* reading the 5th chapter of Matthew, the Parable of the Prodigal Son, and the 21st chapter of the Revelation, on the Common. W. F. Davis also, on the same afternoon, from the top of the same mound of earth, on the same *bare* spot, which Supt. Doogue *kept bare for dumping ground*, *freely* and *publicly* read and expounded, in familiar conversational manner, some words from the Book of Life.

Neither of the preachers delivered a "set sermon, lecture, address, or discourse." Each was accused, in the complaint, of delivering "a sermon, lecture, address, *and* discourse." Judge Parmenter adjudged both guilty, and fined each \$30.00. Both appealed; and each was required to furnish two sureties besides himself in the sum of \$300.00, that he would appear in the Superior Court and prosecute his appeal.

Kind friends, some of whom were before unknown to the preachers, promptly offered the requisite bail, and being let go, they continued to preach the gospel as the Spirit of God moved upon them.

On four of the five Lord's-days immediately following, including the last of the fifth month, and three in

the sixth month, the writer preached the gospel freely on the Common.

The second trial, just referred to, before Judge Parmenter, had developed nothing judicially new, except Judge P.'s remark: "I know nothing of the history of the ordinance; but we find that it was enacted in the interest of order. It is a police regulation."\* How a judge dared to "find," "enacted in the interest of order," a by-law of whose "history" he confessed "I know nothing," but which, in origin and in evolution, in theory and in practice, in language, in spirit, and in execution, is historically demonstrable to be formulated *disorder* and concentrated *anarchy*, is a court-parallel to the feats of Brooklyn-Bridge jumpers, and Whirlpool-Rapids swimmers.

His closing words: "It is a police regulation," were, however, re-echoed industriously by the kettle-drums, as right good words for conjuring away free public preaching from Boston. "'Arrah now! But didn't ye hear Judge Carpenther say, 'It's a P'lice Rigulashun!'"

Yes, we did hear him say it. We do understand perfectly, that the by-law meant to threaten with club and revolver, and station-house, and the tombs, and the police court, and judge, and reporters, and clerk, and dock, and constables, and sheriff, and fines, and black Maria, and black-mail, and jail, and solitary cell of brick walls stone floors and iron doors, the man who dares to freely preach God's Gospel to the common people on the Common grounds of Boston.

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\* *Evening Transcript*, 5, 29, 1885.

We have known from the first that this is "a police regulation," in the sense that it is a by-law passed at the demand of Romish rum-sellers for the purpose of confronting, oppressing, and if possible destroying Christ's free public servants in Boston, by employing the entire police-power of the City to that end. And if we hold in trust a gospel which can be put down and out by such means, by all means clear the City of the venders of such rubbish.

## CHAPTER III.

## CONCLUSION.

"Her princes in the midst of her are roaring lions; her judges evening wolves."—ZEPH. 3: 3.

THE preachers who declined the gag were docketed for further prosecution in the Superior Court for the first day of the seventh month of 1885.

After waiting hours for the trial, the District Attorney offered, through Lawyer Pickering, counsel for Bro. Hastings, *to discharge* the defendants *without trial*, and *without payment of fines*, if they would promise never to come into Boston again ungagged.

But their Master's orders required them to be unseasonably in season in preaching the Word, and they refused to accept deliverance on the terms which required them to disobey God.

Then the Assistant District Attorney arranged an interview with Hastings and Davis in the Attorney's office, and again invited them to surrender, offering as an inducement, that the City would stop the prosecutions, remit all fines and costs, discharge the preachers, and give each of them "a permit;" which, of course, would have to come from the Romish rumseller Mullane and his fellow-conspirators against the rights of all the citizens, to preach the Gospel in Boston on common lands.

Davis was asked what he had to say, and he said, in substance, that he was not at liberty to bargain away

*the Constitutional freedom of public worship guaranteed to every citizen of Massachusetts for a permit to preach, granted to him as a personal favor by would-be usurpers.*

He resented the offer as a bribe tendered by treacherous government officials, who were trying to draw him into complicity with a conspiracy against the equal rights of all the citizens pledged in the United States and Massachusetts Bills of Rights.

Brother Hastings also refused to swallow the bait, and the two rejoined their friends in the court-room and waited in vain for a trial, until the Court adjourned for that day.

On the following day, the preachers again waited from early morning until the noon recess, perfecting patience.

Just after recess, Wm. F. Davis was called.

He had not expected the luxury of legal counsel, as the following correspondence, which it is no injury to any one to publish, will show.

BOSTON, MASS., June 11, 1885.

DEAR BRO. DAVIS :

The son of Father's counsel finds, that while Mr. J. F. Pickering is entered all right as in charge of Father's case, you are separated, and apparently unrepresented. Now if you would like the case to be carried right along with Father's, by our Friend Pickering, both drop a postal to Mr. J. F. Pickering, 9 Common Street, and also notify me by postal at both 13 George Street, Chelsea, and 47 Cornhill, Boston.

Otherwise, they may shunt you off on a side track, and get you all alone where we cannot help you, as I think they would like to do.

Sincerely yours,

JOHN KING HASTINGS.

The foregoing, received by the writer at the place where he was then holding Gospel meetings, was answered as follows :

SAXONVILLE, MASS., 6, 12, '85.

DEAR BROTHER :

Yours of yesterday received this A. M. Thanks for the thoughtful kindness which prompted it. I cannot conscientiously ask Lawyer Pickering to plead my case, for two reasons :

First: the Lord has not given me the means to remunerate him for his service. Second: if nothing but the technical skill of a competent lawyer will save my case in Boston courts, it will be conclusive evidence to me that either my case is, or the courts are, so bad that a vindication by them would discredit me.

I have a high opinion of the ability and intention of Lawyer Pickering, but for the reasons given must allow the prosecutors, if they please, to 'shunt' me 'off upon a side track and get' me 'all alone.'

Sincerely,

Your brother in Christ,

WM. F. DAVIS.

But the case against the writer was docketed for trial first. It was justly feared by Bro. Hastings' friends, that the Court might take advantage of the writer's utter ignorance of legal technics, to rob him, in the trial, of his just rights under court customs, which in his ignorance he might not know how to claim, as actually happened in the trial in 1887, when he had no lawyer, and was sent to jail for a year, instead of being permitted to present his exceptions for appeal to United States Supreme Court.

In that case, if the court condemned the writer, that



decision would be quoted as a precedent to the injury of Brother Hastings. Thus it was the writer's unexpected privilege to have the aid of a very able lawyer, to the advantage of all concerned, except, indeed, of Squire Pickering, who served without fee.

The *Boston Journal* of the seventh month, third day, 1885, contained a fairly accurate account of this trial, which is accordingly here re-produced entire.

### "CITIZENS OUGHT TO OBEY."

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JUDGE ALDRICH DECLARES THAT THE CITY HAD THE RIGHT TO PASS THE "PREACHING ON THE COMMON" ORDINANCE. — REV. MR. DAVIS' CASE PARTIALLY SETTLED AND THE SALVATIONISTS' PLACED ON FILE.—REV. DR. GORDON'S FINE PAID.

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Again the preachers of the Common and the red-shirted warriors of the Salvation Army assembled in the Superior Court on Thursday to await the trial which the overabundance of cases Wednesday, had postponed. For three hours or more Rev. Mr. Davis sat in the spectators' seats, apparently regardless of the momentous liquor and assault cases going on in the room, reading his Greek books, and causing the untutored loungers around him to wonder whether the learned evangelist intended to testify in Greek or Hebrew for the edification of the jury of his peers. Rev. H. L. Hastings was there with a half dozen "Christians" tucked under his arm, and looking the embodiment of a goodly man rather than of an accused malefactor; while Abijah Hall and the other assistants who had raised their voices in common harmony with the exhorters, sat near at hand. The Salvationists scattered about in the witness seats made it appear as though the court had been invaded by a troop of firemen from the country. Lawyer Pickering was within the bar, looking carefully after the interests of his clerical client.

Just after the noon recess, the Clerk called "William F. Davis," and the preacher of that name advanced to the bar. The clerk read the official papers charging Mr. Davis with

twice delivering a sermon, discourse or address on the Common, and then Patrolman George F. Malcolm was called.

Officer Malcolm testified to have heard Mr. Davis speak publicly on the Common, and to having secured, under instructions from his superior officer, warrants for the arrests.

Mr. Pickering, counsel for the defence, started to show, on cross-examination of Mr. Malcolm, that the city has not heretofore enforced the ordinance, and that by non-usage it had become obsolete. Judge Aldrich didn't think a law could become obsolete, and ruled out evidence relating to that question. The Judge also ruled out proposed evidence tending to show that there was no disturbance, no breach of the peace, and also proposed evidence showing the character of the attendance.

Officer Little corroborated Officer Malcolm. District Attorney Stevens then read selections from the city ordinances, bearing upon the prohibition against preaching without a permit, passed Feb. 28, 1870.

City Clerk Augustus N. Sampson testified that the ordinance of 1870 was passed and published in the newspapers; the revised ordinance was not published.

Selections from the city charter were read bearing upon the authority over public lands granted to the Mayor and Council.

This closed the case for the prosecution. Mr. Pickering opened for the defence by saying that the General Statutes, chapter 18, section 14, and the Public Statutes, chapter 27, section 21, required the recording of the by-law, and he held that "ordinance" and "by-law" were synonymous.

Edwin W. Bullard testified that he was employed in the clerk's office of the Superior Court.

Mr. Stevens here admitted that this ordinance had not been recorded. Mr. Pickering said he wished to show that several ordinances had been recorded during the past twenty years, while others had not been. Judge Aldrich thought this was immaterial, but Mr. Stevens asked the question as a matter of curiosity, and Mr. Bullard replied that he had found three ordinances recorded in the past twenty years.

Mr. Pickering then argued that the city ordinances, though exempted from approval, were not exempted from record. He argued, too, that the revised ordinance was a new ordinance, and, therefore, the publication of the old ordinance

was not satisfactory as a publication of the revised ordinance; the city law requires publication in the newspapers. The words "these ordinances shall be construed as a continuation" of the former ordinances were not capable of relieving the city from publishing the revised ordinances in the papers. This ordinance in question was neither useful nor salutary; it was not "needed to preserve the public peace," which was the only ground on which it could be made. The Bill of Rights gives to each man the right of worshipping as he sees fit providing he does not disturb other men; the City Council had no right to make this ordinance, for it was opposed to the Bill of Rights. The city assumes the place of Satan and says, "If you preach you must preach on the same terms that Satan asked of Jesus Christ." This the defendants must respectfully decline. The Common had been used from time immemorial for preaching the gospel. Then the City Council undertook to forbid preaching on the Common on the ground that the grass was injured; they say that last year \$800 worth of grass was damaged. Even if it had been damaged, was the result not worth it as much as the result of a band concert would be? But now they have given the Y. M. C. A. and the Salvation Army permission to preach one hour each, and this has come from the stand taken by Mr. Davis. It was said to me, that if we had a right to preach there, then a circus had a right to come there and perform.

Mr. Stevens here interrupted: "I never said anything of the kind to you."

Mr. Pickering: "Yes, sir, you did; it came directly from your lips." Then he continued: If a circus performance was put down in the Bill of Rights as one of the proper and inalienable rights of man, then perhaps that might be brought into the question.

Mr. Stevens said he not propose to answer "Rev. Mr. Davis' argument," but only to apply himself to the questions before the court." A by-law, he said, required no approval or record. The ordinance of 1870, although not required to be published, yet was published. The city charter did not require publication. The city itself had decided that the ordinance should be published; but the revised ordinance was in effect the same as that of 1870, and therefore was in fact published.

Judge Aldrich said it was a question whether the matter should be submitted to the jury, there being no question of facts submitted, but it all being a question of law. There was no occasion for any feeling in the matter; it involved no question of the right of speech, or of the right of preaching the Gospel. The simple question is, whether the city had a right to pass the ordinance. If they had, then they had a right to enforce it. The idea that in the Commonwealth of Massachusetts such a question—that the freedom of the Gospel could be infringed—could be raised or suggested, must be a surprise to all. The simple question is, whether the City of Boston has a right to forbid public discourses in public places without a license. If the city has the right to pass the ordinance, then every citizen, and every Christian citizen especially, ought to obey the law. A good citizen should obey the Government, and not set up a government within a Government. If I entertained doubts about the right of the city to pass such an ordinance, it would be a very extraordinary exercise of authority for me so to declare it here. Unless it was beyond all doubt, unless I was absolutely sure about it, I should let it go to the Supreme Court. Observe, that this ordinance under consideration does not affect merely preaching of the gospel; but provides that no person shall, without permission, deliver a sermon, lecture, address or discourse on the Common. The legitimacy of the ordinance is not to be determined by the result of any one sermon or discourse. The laws are passed on general results. The defendant might go on the Common and preach without disturbing the peace at all. Another gentleman might lecture on astronomy, or another on geology or political economy, all questions of importance, without disturbing the peace. But that is not the basis on which the law was passed. The basis is, what on the whole does public policy demand? Is it wise to open the public grounds and allow anybody and everybody to deliver discourses? In the judgment of the city, as declared for many years, it has been thought wise to pass such an ordinance; and under the Constitution and charter, I entertain no doubts as to their right to pass such an ordinance. I have no doubt beyond that, that upon a proper application, any reasonable committee of the City Government would grant to a gentleman this right. Whether they act reasonably or not isn't the question. I

therefore have no doubt that the city had the right to pass such an ordinance, and every good citizen ought to abide by such law, until it may be declared by the Supreme Court to be void. The defendant has a perfect right to carry the question there, and it may be his duty; but here having no right to declare as a court of final result the constitutionality of laws, I deem it my duty to say that the city had the right to pass such an ordinance. Have they done what is necessary to make valid such a law? Is it necessary in order to give the law validity that it should be published after being passed? It is conceded that that particular ordinance has never been published in any newspaper. Is it invalid? To meet that objection the third section is invoked, declaring that these revised ordinances shall be construed as continuation of the former ordinances. Does that make the new ordinance the same as the old one, and not a new enactment? This is the doubt in my mind—should not these ordinances have been published? And is this ordinance invalid by reason of the non-publication? Those are the only two questions of doubt. If parties are willing to waive all objections, I will take occasion to consider these questions this evening and declare the verdict in the morning.

The counsel agreed to this, and the verdict will therefore be rendered by Judge Aldrich today. The case of Rev. H. L. Hastings was continued to abide by the decision in the case of Rev. Mr. Davis.

Two of the cases which were expected to come up were settled without legal proceedings. Rev. Dr. A. J. Gordon's fine had been paid by the Young Men's Christian Association, and a trial of that gentleman in the Superior Court was thus avoided. This was a portion of the arrangements for the Association's preaching under a permit upon the Common. An agreement was made by the Government with the Salvationists whereby the latter should plead "nolo," and then the Government, on the knowledge that the Army had obtained a permit, with the intention in future of respecting the ordinance, would drop the prosecution of their case. This arrangement was carried out in court, and the Salvationists, Blood-washed Willie Dean and Lieutenant Lizzie Blopia, in full uniform, far outshining in gorgeousness the brass-buttoned coat of the Sheriff who escorted them, stepped to the bar of justice and declared that they did not

wish to contend. District Attorney Stevens then moved that the cases be placed on file and the parties discharged. This was done, and the warriors, relieved from court duty, right-about-faced, and marched in double quick time from the halls of justice.

Passing by the error of fact in District Attorney Stevens' plea, which hinged the case for the city on the *passing and the publication* of "the ordinance of 1870;" whereas the City Clerk then and since has testified that that "*the ordinance*" under which these trials were all brought was *never* "*passed*" nor "*published*" at all in 1870;\* let us, the common people, the kings and governors of this city, revise our servants' work in a broad and common-sense manner.

Over and over again we congratulate ourselves, in public and in private, that in contrast to the tyrannous monarchies and oligarchies of Europe and of Asia, *ours* is the government of *the people*, by *the people*, and for *the people*. Therefore, if it is to be stable and permanent, there must be candor and intelligence in the people who are the governors.

Suppose, now, a candid and clear-headed man wants to form a sound opinion on the pivotal question in this case. What is that question? We all agree with Judge Aldrich as to what that question is; just as we all agreed with Judge Adams and Judge Parmenter as to the cardinal question on which all these cases hinge. We are satisfied with it in the form stated by Judge Aldrich: "The simple question is, whether the City of

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\* Lawyer Pickering pointed out this false claim at this trial, but it was good enough material for Attorney General Sherman to hinge his argument on afterwards, and the Supreme Court Judges did the same. *Appendix*, pp. 12-18, and 59-66.

Boston has a right to forbid public discourse in public places without a license." Now an honest machinist at Jamaica Plain, accustomed to fit the balanced parts of some nicely adjusted machine in Sturtevant's extensive works, sits down to study this question, to see if the gag-by-law fits the indispensable parts of our governmental machine of jurisprudence, with its checks and balances, as that machine is authoritatively described by the Constitution and the Statute laws of this Nation and Commonwealth.

Will the decisions of the judges, or of any officer of the government, before whom this question has yet come, aid the citizen at all to form a clear and sound opinion in the case? It is simply a matter of history, that neither from any one of them, nor from all of them together, can he derive the slightest aid, so far as they have yet spoken, towards deciding whether this gag-by-law does, or does not, threaten the abolition of a fundamental right, guaranteed him in the National and State Charters.

If he began to study their utterances with any confusion of mind as to the real merits of the case, the probable effect of their words would be to leave him in confusion worse confounded. And this must be kept in mind, in reviewing the contradictory reports and remarks of the press, both secular and religious, on this subject. The writers for the press have assumed that *the judges could be relied upon to impartially declare written and established law*. On the contrary, the judges furnish abounding proof in this case that they were chiefly weather-vanes to show how the wind blew from the City Hall, and that the hiccoughs ordinance.

of the City Council was more revered by them as *law*, than the highest, and deepest, and sacredest charters of the rights of all the citizens of the United States, and of the citizens of this State, as solemnly and prayerfully pondered, formulated, written, and published by the venerated fathers of our Nation and State, and adopted by the people, and cherished for more than a hundred years as the distinctive crowning glory of our Nation above all the nations of the globe.

This case has yet to be tried before a judge in Massachusetts, *who, for a moment will pretend to have any opinion concerning preaching in public places of Boston, except such as he finds expressed in the gag-by-law on that subject.*

Notice Judge Parmenter's remarks, on the occasion when he fined H. L. Hastings \$30.00 for reading those three chapters, sweeter than white-clover honey, and more precious than nuggets of fine gold, freely, to the hungry poor who thronged around him on Boston Common on that 4th Lord's-day of the 5th month of 1885. On the same occasion the Judge also fined W. F. Davis \$30.00 for familiarly expounding, or distributing, the sweetness and the jewels to the receptive people. The latter pleaded that his extemporaneous remarks accompanying the Words of Life which he read, could not be properly dignified as a set "sermon, lecture, address, or discourse." "What would you call them?" asked Judge P. "Simply, off-hand comments, or expository remarks," replied the defendant. "Don't you think there was the *material* of a sermon in them?" queried the judge. "I should hope so," said the preacher. The judge commended his "frank-



ness;" as if it were a matter of commendable surprise that a man should be found telling the truth in a Boston police-court; and proceeded to the examination of H. L. Hastings, who had not, as he supposed, delivered a "sermon, lecture, address, or discourse," but only read the 5th chapter of Matthew, the 15th chapter of Luke, and the 21st chapter of the Revelation. But the judge "found" that Bro. Hastings was with Davis, in whose *ex tempore* comments he "found" the "material of a sermon;" and so he "found" them both "guilty" of—what? Of "delivering a sermon, lecture, address, *and* discourse," contrary to the ordinance. Did Judge Parmenter decide that these services were "against the *peace* of the Commonwealth," as the lying complaints under which the preachers were arraigned alleged? Not at all. He heard, and believed the testimony of his own witnesses, the complaining policemen, that these services were orderly, beneficial, and influential in preserving the peace; as the free publication of the gospel always is.

And when a man was afterwards arrested by a policeman for wantonly disturbing one of these very meetings, Judge Parmenter defended the meeting, so far as its character as a peaceable, beneficial, gospel meeting was concerned, and fined the man \$3.00 for disturbing it, or one-tenth as much as he fined each of us for holding such a meeting! But what great principle of *law*, what venerable landmark of *equity*, and *truth*, and *justice*, did Judge Parmenter quote to justify his decision on this occasion? NONE WHATEVER. The attentive ears of many listeners were rewarded with nothing from all the rich treasures of jurisprudence weightier than this,

which was faithfully set down by the reporter for the *Boston Evening Transcript*, 5, 29, 1885: "*The judiciary department sits to enforce the laws in the cases brought before it.*" Or in plain colloquial English, *a judge is nothing but a judge.* Well, who doesn't know that? The injured air with which the *judges* in these cases have reiterated the assertion that they are not *legislators*, would seem to imply that the Boston-Common preachers had been demanding of the courts that they usurp the functions of the National Congress, or of the Massachusetts General Court, or of the Boston City Council. Ignorant though we may be, and ought to be, of many things in which the municipal judges are expert, we are not such fools as not to comprehend the generic difference between the legislative, executive, and judicial departments of our National, State, and City governments.

*This* is our complaint against *you*, O unjust judges, that whereas you *were* appointed for this very purpose of *checking and balancing the abuses of power, always liable to arise in the legislative department, by detecting, exposing, and rejecting unconstitutional and wicked ordinances or statutes* even, in the exercise of your discretionary power as *judges*, independent of the legislative department, you have totally failed in all these cases to do the very thing you were appointed to do. How splendid the opportunities which you have diligently and studiously *missed*, of showing to all Boston, New England, the United States, and the whole World, that you are *fit to be judges*, and to be trusted when you say, "*The judiciary department sits to enforce the laws in the cases brought before it,*" by rejecting

the infamous Boston gag for gospel preachers, as *no law*, but formulated lawlessness, and *the attempt to legalize anarchy*.

But instead of this, you have preferred again, and again, and again, and as many times within the past three years as you have tried this question, and been tried by it, to exhibit yourselves in complicity with that ring of raiders on all the dearest rights of Massachusetts citizens, who have crept and crowded themselves into the City Hall, and who now believe they can ordain all wickedness *by-“law” unrestrained, unchecked, and unbalanced*.

But though no Municipal or Supreme Court judge in Boston has yet lifted the keen sword of righteous judicial decision against these monsters of legislative crime, let them not, therefore, be in haste to rejoice over the common people of Boston. For He that made this City-Hall behemoth can make his sword to approach unto him.

But you will say, “‘One swallow does not make a Spring.’ Because Judge Parmenter unquestioningly accepted and passed the gag-law as good legal tender, that does not prove all the judges to be the fences of legislative counterfeiters.”

Certainly not. But judges must surely be judged by the trials which they themselves conduct, *as they conduct them*. The writer is a novice in these things, but he can learn simple lessons, though it be slowly, when they are repeatedly hammered into his head. He was amazed, at first, to hear Lawyer Pickering before Judge Adams, admit *that officer’s incompetence* to see anything as large as the Massachusetts Constitution and Bill of

Rights. But the experienced lawyer knew perfectly well that the Judge's *legal* conscience would not allow him *to think any city ordinance unconstitutional*, whether it had been approved, recorded, and published as the law requires or *not*, and even though it slashed out whole articles from the Constitution with a brigand's broadaxe. Nor can the thoughtful, honest citizen get any help from a judge in the *Superior Court*, in attempting to decide the question whether the Vandals have overrun the bulwarks of a once free government, and quartered themselves within "The Cradle of Liberty."

For Judge Aldrich starts back in affright at the very thought of judicially rebuking the City Council for their Satanic temerity in passing that ordinance; saying, "*If I entertained doubts about the right of the City to pass such an ordinance, IT WOULD BE A VERY EXTRAORDINARY EXERCISE OF AUTHORITY FOR ME SO TO DECLARE IT HERE*"!!

Merchants of Boston! how would you like to have the private watchmen whom you employ to guard your treasures take for their motto, when visited by a burglar and ordered to surrender your valuables, this sentence uttered by Judge Aldrich when he was confronted by the measureless impudence of the swell-mob of City Hall? By *his own public confession*, Judge Aldrich, in the very court-room where he has been solemnly clothed with full legal powers to defend the inestimable liberties of all the people against all usurpers, *dared not tell the citizens that the City Council had made a revolutionary attack upon the Massachusetts Bill of Rights, even though he thought so!*

Who, after that, cares a copper cent for his opinion in this case? He had left himself but *one possible thing to say*: "I entertain no doubts as to their right to pass such an ordinance." Why should he entertain doubts that he dare not utter? They might interfere with his friendly relations with the burglars of Christian Liberty in Boston. Christian citizens! you have only to now quietly consent in silence to see our greatest *public* rights thus struck down at one blow by the Boston Tammany Ring, and these vultures will pick the bones of your *private* and *corporate* fortunes at their leisure.

FOR, THE ENDORSEMENT OF A GENERAL GAG-BY-LAW IS THE ENTHRONEMENT OF ANARCHY; just as THE UNIVERSAL PREVALENCE OF PUBLIC CHRISTIAN LIBERTY IS THE HIGHEST PROOF AND SECURITY OF SOLID FREE GOVERNMENT.

But how can an honest, thoughtful American citizen-king, find out surely whether his hired servants, the City Councillors, are anarchists in disguise, who are trying to paralyze his tongue while he is asleep, by the device of a city by-law, in defiance of the Great Bills of Rights? By asking the Attorney-General of the Commonwealth? That lofty officer scorned to entertain any inquiry from a private citizen on this matter; and when the case went before the Supreme Court of Massachusetts, his false brief showed him to be hand-in-glove with the black ring of the City. Ask the Governor? The writer did; and found Governor Robinson just as unable, or unwilling, as the judges afterwards were, to admit the opinion that any ordinance passed by the select City Councillors of Boston could conceiv-

ably bring the rights of citizens into jeopardy. Gov. Robinson insisted on assuming the immaculateness of the plotters of City Hall, even when their gag was put before his eyes. But the common people in this country are the kings. The officers of the government are only their stewards, their servants. If our servants are blind, or unfaithful, or impudent, and will not serve us according to the terms of the great legal contracts, the Constitutions, Bills of Rights, and statutes, we must serve ourselves, according to the homely proverb, "Keep a dog, and bark thyself."

If the men to whom we pay large wages to protect the interests of the commonwealth of honest common citizens, spend their time and energies, and our money, in self-glorification, and in conspiring with, or winking at rogues, who would cheat us out of our liberties, and if, when we meekly question them, they refuse even to look at the case, and bring us a true report, we must wait on ourselves, until such time as we can provide ourselves with honest servants.

It is competent for *any sensible citizen* who can squint from one stake to another, and tell whether a post is, or is not, set in a line with the two, to tell whether this gag-by-law is in the line of the United States and Massachusetts Bills of Rights.

This is not the arduous, dangerous, and perplexing work of governmental pioneering, exploration, and civil engineering. Ours is not the task to set the stakes and drive them. That work was done more than a century ago, by men whom the whole world now delight to honor; and in most respects it was well done.

*It is our business*, as citizens entrusted with self-

government, to *notice* and to *know where those stakes were set*, which are the landmarks of our Christian Liberties. And it is our business to know this so well, that no land or timber thieves can flatter, frighten, or lie us out of our ancestral inheritance. And if we know enough to take forth what is precious from what is vile, we will not barter that kingly inheritance for all the slavish pottage this world can sod.

Christian citizens, here is the National stake set at the head of the land-marks of our rights as United States citizens.

Constitution of the United States: Amendments, or Bill of Rights, Article I.\*

“CONGRESS SHALL MAKE NO LAW RESPECTING AN ESTABLISHMENT OF RELIGION; OR PROHIBITING THE FREE EXERCISE THEREOF; OR ABRIDGING THE FREEDOM OF SPEECH, OR OF THE PRESS; OR THE RIGHT OF THE PEOPLE FREELY TO ASSEMBLE, AND TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES.”

Keep that shining stake well in mind. Let no anarchic City Council dare despise it! Now look at the corresponding Christian-Liberty stake of the Bill of Rights of the Massachusetts Constitution.

The first article of the Massachusetts Bill of Rights is a reaffirmation of the principles expressed in the National Declaration of Independence. Now, let us look at the second.

“Article II.—IT IS THE RIGHT AS WELL AS THE

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\* The basis of our political system is, the right of the people to make and to alter their Constitutions of Government. But the Constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all.—*Washington's Farewell Address.*

DUTY OF ALL MEN IN SOCIETY, PUBLICLY, AND AT STATED SEASONS, TO WORSHIP THE SUPREME BEING, THE GREAT CREATOR AND PRESERVER OF THE UNIVERSE. AND NO SUBJECT SHALL BE HURT, MOLESTED, OR RESTRAINED, IN HIS PERSON, LIBERTY, OR ESTATE, FOR WORSHIPPING GOD IN THE MANNER AND SEASON MOST AGREEABLE TO THE DICTATES OF HIS OWN CONSCIENCE, OR FOR HIS RELIGIOUS PROFESSION OR SENTIMENTS; PROVIDED HE DOTH NOT DISTURB THE PUBLIC PEACE, OR OBSTRUCT OTHERS IN THEIR RELIGIOUS WORSHIP."

Take your stand, Christian Citizens, at either the National or State stake, and squint from one to the other, while the City Council of Boston drag up their gag-by-law, and pretend to set it up along *the narrow parallel of municipal jurisdiction for securing local peace, order, and health, which runs at the left hand of the broad National and State thoroughfares of chartered Christian Liberties for all the citizens.*

Down go their stakes! Up goes the gag! Now squint! What do you see?

"No person shall, without the permission of the mayor, deliver a sermon, lecture, address or discourse, upon the Common, or other public grounds." Sec. 11, Chapter 42, Revised Ordinances of Boston, 1885.

"Why!" you exclaim, "those fellows have n't left the public any public roads, or parks, or Commons at all! They are chopping down all our liberty trees and cutting them up into policemen's clubs! They've made the Mayor everybody, and the people nobody! As true as you live, they are trying to shut off our wind!" Of course they are. And when two simple-minded



citizens honestly persisted, two years ago, in walking ungagged on the common ground of the common people, after these new explorers had pretended to run their lines so as to leave no common ground, Judge Aldrich treated these citizens as if they were criminal trespassers, and the City-Hall thieves as if they were the original, sole, only, and indefeasable proprietors of all public grounds, and asked whether the public had any right to talk on their own grounds. "Is it wise to open the public grounds and allow anybody and everybody to deliver discourses?" Shades of Washington and Patrick Henry! appear not to our Municipal Court judges; unless it is ordained that they be frightened into renouncing the conspiracy to which they have capitulated, to shut off the breath of the people on the people's own grounds. Judge Aldrich refused every ruling in the interests of public justice and Constitutional rights asked by the defendant's counsel, and "ordered a verdict of Guilty."

From that verdict the defendant appealed to the Supreme Court of Massachusetts, on a bill of exceptions presented by Lawyer Pickering;\* bail was given for his appearance to prosecute the appeal in person or by counsel; and he continued during the remaining Lord's-days of that summer to preach God's Gospel freely and publicly on common lands of Boston.

It was agreed between Lawyer Pickering and the Counsel for the State to submit the case on briefs to the Judges of the Supreme Court.

These briefs are printed in full in the Appendix.

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\*See *Appendix I*, pp. 3--11.

Let the candid reader who cares and dares to read, weigh, think, and speak for himself, say if Lawyer Pickering's argument is not a demonstration, as perfect as any proof of geometrical propositions in Euclid, that the gag-by-law is utterly unconstitutional.\*

Thoughtful readers will notice that the Attorney General did not meet that argument, nor controvert it.†

Thoughtful readers will notice too, that the judges of the Supreme Court in their decision, a *verbatim* copy of which is printed in Appendix 4, pp. 59-66, did not meet, and redargue lawyer Pickering's argument proving the unconstitutionality of the gag-by-law. It will not escape observation, that the Attorney General of this State, and the judges of the Supreme Court, in trying this case, gave, instead of citing *documentary constitutional law* in support of the gag-by-law, *nothing whatever* but their empty *dicta*, their *legally unsupported*, and therefore *legally worthless* opinions, mere sounding brass, and tinkling court cymbals. We listened for quotations from the Constitutions of Nation and State, and heard only their "We say so," in favor of the gag.

The Attorney General says of the ordinance, that it is a "needful and salutary law," "not inconsistent with the laws of the Commonwealth." "The ordinance in question was absolutely indispensable."‡ Is he not presuming too much upon the illiteracy of Massachusetts citizens, and upon the long-suffering of God?

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\*Appendix 3, pp. 19-58.

† Appendix 2, pp. 12-18.

‡ Appendix 2, p. 18.

But the Judges of the Supreme Court of Massachusetts all chimed in with him, and shouted out the falsehood from a full bench, "So say we all of us." "This ordinance is not inconsistent with any law of the Commonwealth, and we see no ground for holding it to be unreasonable and invalid. Its purpose is to promote the public peace, and to protect the public grounds from injury, and it is calculated to effect these ends without violating the just rights of any citizen." \*

If Christian citizens hereafter have any respect for this State Attorney and these Supreme Court judges, it will assuredly be in spite of their deliverances in this case, and not because of them.

Gentlemen, we know your voices *now*, too well to ever make the mistake *again* of confounding them with the majestic tones of the Bills of Rights, if we were ever in danger of committing so great a blunder.

Your *say-so* on other questions will not henceforth command the respect of some thinking men in this Commonwealth, that it might have received if you had not chosen to display this monstrous malfeasance in the decision of the *largest* question capable of arising under our form and symbols of government.

A *revolutionary decision* by the Supreme Court of a State is not forgotten in a *week*, by citizens who know what their government has been during a *century*. You have compelled law-abiding citizens of Massachusetts to look to the Supreme Court of Michigan for a sound decision on this question. Nor is it forgotten,

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\* Appendix 4, p. 64.

that in Michigan, in a case less simple than ours, the Supreme Court rendered their decision *in full view of printed reports of this case*, including exceptions, briefs, and judges' decision, completely reversing your decision, and giving good constitutional reasons for their course, for which we looked to you in vain. While trying this case, have you not been tried, and found wanting in fidelity to the oath of allegiance which you took, when you said: "I, — — —, do solemnly swear, that I will bear true faith and allegiance to the Commonwealth of Massachusetts, and will support the Constitution thereof. So help me, God."—Did you really mean it?

In choosing to give your official support to an ordinance which legislates directly against the free publication of God's Gospel, the greatest bulwark and firmest foundation of the safety, peace, and prosperity of this, or of any Commonwealth, have you not deliberately declared, and actually levied war against this Commonwealth, and against the Great Jehovah, the only true God, whom you solemnly invoked to save this Commonwealth? And unless you repent and confess your transgressions, will a righteous God fail to blot out your names from the roll of honorable and just judges who have served their fellow-citizens in this State? It is Jehovah God whom you have wantonly affronted, in your unrighteous condemnation of the humblest of His ambassadors; and you must now be reminded that, except ye repent, the Maker of these heavens and of this earth will destroy your names and inheritance from off this earth and from under these heavens.

In the 11th and 12th months of 1885, the writer,

thinking it would not be showing proper respect to the judiciary of Massachusetts for him to be absent for a term of six months in the Northwestern States, in the prosecution of his usual missionary labors during the winter months, while they were deliberating over his alleged lawlessness in Boston, confined his labors to New England, pending the decision of the Supreme Court. That decision was given early in the first month of the year 1886. A quotation from Record of the Christian Mission, III. 1, pp. 13-14, is here in point.

“On the afternoon of the 13th day of the first month of 1886, the Superior Municipal Court of Boston called the case of William F. Davis, convicted of twice preaching the gospel on Boston Common during the previous summer, without a permit from the Common Committee. The defendant stood up, was told that the Supreme Court rejected his appeal, and he was fined ten dollars and costs for the first offence, and thirty for the second. The costs connected with the first fine were forty-one dollars and thirty-five cents. Therefore the sum of both fines and costs was eighty-one dollars and thirty-five cents, and the defendant was ordered ‘to stand committed until paid.’

“Accordingly he stood committed, and took a seat indicated by the sheriff until that officer should be ready to conduct him to jail. But Pastor Silas P. Cook, of the Third Congregational Church in Chelsea, whose Christian friendship has been proved repeatedly since our acquaintance began in Harvard College twenty-one years ago, and who, I had hoped at this time, since he was an eye-witness of the judgment rendered, would be

an authentic messenger to my family, went to the sheriff and received from him a promise that he would tarry with his prisoner in the court-room for an hour, within which time Pastor Cook promised to return with the specified eighty-one dollars and thirty-five cents, which he expected to be able to raise by the assistance of friends.

“In vain did the condemned missionary attempt to dissuade his old-time college-chum and class-mate from his purpose; arguing that the one whom the court had adjudged guilty should suffer. In vain did the writer plead that there was no knowing when the fine could be repaid; that the free public preaching of Christ’s gospel to the needy masses was a cause in whose defense he was not ashamed to be cast into jail; that he had with open eyes disobeyed the city ordinance which forbids preaching, and would probably again improve the earliest opportunity to preach on Boston Common, if set free.

“To all these, and other dissuasions, Bro. Cook steadily opposed the necessity of *his* doing what *his* conscience required, and by half-past five o’clock he had paid the fine, we left the court-room together, and took the Chelsea car for our respective homes. The next day was spent in preparations to resume missionary work in the West, and on the following morning, the fifteenth day of the first month of 1886, the writer started on his seventh missionary trip through the spiritual wilderness and waste places of the Lake States.

“Had he been given any opportunity to speak on the occasion of receiving his sentence, the writer would, if permitted, have appealed to the United States Supreme

Court. Lawyer Pickering was sick in bed at the time, and could therefore render no legal aid, though his son kindly proffered assistance. So the prosecution had it all their own way, and anti-Christ scored another outward victory over Truth and Christian Liberty in Boston. Brother Hastings was brought up later, fined, and sent to jail; where he remained until the fine was paid, after he had been confined six hours.

“After an absence of more than five months, filled with missionary work, involving more than 6,000 miles of journeying over land and lake, through thickets and forests, in snow and in rain, by conveyances the most primitive and most modern, the writer returned to Mt. Washington, Chelsea, Mass., on the 22d day of the fifth month of 1886, on the last day of the week.

“As he passed through Boston, he learned by inquiry that though there had been much fine weather, yet no open-air meetings had yet been held on Boston Common that season.

“Accordingly, on the following morning, the morning of the Lord’s-day, he walked into the city, attended the meeting of the Society of Friends at 10.30 A. M., their Sunday-school at 12 M., and at 2 P. M. preached on that part of Boston Common known as Flag-Staff Hill, where he has conducted free Gospel meetings every summer but one since the first Lord’s-day of the sixth month of 1882. While preaching, a policeman commanded him to stop. But the Lord had commanded him to go on. Accordingly he stopped long enough to give his name and address to the policeman, and take that of the officer, and then went on with the preaching.

“The services, lasting an hour and a half, were attentively listened to by about five hundred people, a few of whom testified their acceptance of the Saviour, by uplifted hands, at the close.

“During the three ensuing summer months, it was my privilege to preach the Gospel out-doors and in-doors every Lord’s-day, and on many week-days besides. Eight Lord’s-days these meetings were held on Boston Common. The first two of these meetings were the only ones in any way disturbed by those set to be the defenders of the peace. All were well-attended and were orderly, with the slight exception just mentioned.”

During the present summer, 1887, the writer has held meetings on the afternoons of the Lord’s-days at the usual place on Boston Common, beginning early in the 5th month. He has also preached the Gospel publicly and freely on Franklin Park, at Depot Square, Jamaica Plain, and on Chelsea Square.

He has been fined on four complaints for preaching the Gospel on the Common, \$50 and costs on each complaint, and Judge Staples adjudged him a debtor to the city, for these four sermons freely preached, \$350. As the salary paid him by city officials for ministering God’s Gospel to the common people is all in fines, of course the city has nothing but unpaid fines for all its fining, and so these officials send the preacher to jail for a year to show their hatred of Christian Liberty in Boston.

The limits of this pamphlet forbid a particular review of the several trials and evasions of trials suffered by the writer at the hands of court officials for preaching during the past summer, and as these events are so



recent and presumably familiar, it is not now necessary to repeat the details. Suffice to say, that the writer has now been confined in jail six weeks and one day, including the week spent here before sentence was declared, because he believes, and shows it by his conduct, that AGAINST THE FREE PUBLIC PREACHING OF GOD'S GOSPEL TO THE COMMON PEOPLE, ON COMMON LANDS OF THIS COMMONWEALTH, THERE IS, AND THERE CAN BE, NO JUST LAW.



## APPENDIX.



# APPENDIX.

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[1.]

COMMONWEALTH OF MASSACHUSETTS.  
SUPERIOR COURT FOR THE TRANSACTION OF  
CRIMINAL BUSINESS.

*SUFFOLK, ss.*

*JUNE TERM, A.D. 1885.*

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COMMONWEALTH *vs.* WILLIAM F. DAVIS.

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## DEFENDANT'S EXCEPTIONS.

Two complaints made in the Municipal Court of the City of Boston for criminal business, brought to this Court by appeal, and here tried together, charge that the defendant, on the seventeenth day of May, 1885, and on the twenty-fourth day of said May, did deliver a sermon, lecture, address, and discourse on Boston Common, without permit, and in violation of Section 11, of Chapter 37, of the Revised Ordinances of the City of Boston.

Said complaint may be referred to as part of these exceptions.

On the trial, the government offered the following evidence:—

George F. Malcomb, a police-officer of the City of Boston, testified, that he was on the Common, Sunday, the 17th of May, and saw the defendant there; and he

further said : “ Previous to my coming from the station-house, I had instruction from my Captain to inform these people who preach on the Common that they must stop, must not preach there, and I was to repeat that instruction or information to them, and if they didn’t, why, I must take their names ; so I came out and saw Mr. Davis, who was preaching at the time. I didn’t interrupt him then until he got through with what he was saying and commenced to sing, and then I stepped in and spoke to him ; but still they went on. I told him that we had been instructed to instruct them that they must stop preaching on the Common ; that they must not preach any more ; and I think the reply that he made was, that he certainly should preach, and so I let it go at that.” This witness further testified that nothing was said about the matter of a permit at that time ; that he was on the Common on the following Sunday, and the defendant and Mr. Hastings were there ; that the defendant spoke, and Mr. Hastings read three chapters from the Bible and sung, and the witness took their names again, but had no conversation with them. That the place where this preaching, reading, and singing took place was on that part of the Common known and used as the “ Smokers’ retreat,” and a barren place ; that five or six hundred persons were present at the time of the preaching on May 17.

John W. Little, a police-officer of the City of Boston, testified : that he was present, and heard the defendant preach and sing on the Common on the 17th of May.

Augustus N. Sampson, testified : that he was City Clerk of the City of Boston, and had examined the records of the Revised Ordinances, and that the ordi-

nance of February, 1870, which may be referred to as part of these exceptions, was passed and published in the newspapers at that time; that the ordinance under which these complaints are made, Section 11 of Chapter 37 of the Revised Ordinances of the City of Boston, was passed; but it has not been published in any newspaper. Said Section 11 of said Chapter 37 may be referred to as a part of these exceptions. Section 3 of Chapter 1 of said Revised Ordinances was put in evidence by the government, and the same may be referred to as a part of these exceptions. Also Sections 35 and 39 of the Charter of the City of Boston.

The defendant, by his counsel, admitted that he had received no permit to preach on the Common.

This was all the evidence for the government.

The defendant, by his counsel, offered to show, by the cross-examination of the witnesses for the government, and by other evidence, that preaching has taken place on the Common from time immemorial without permit being granted, until since the first of these complaints was made; that this ordinance was passed originally on the 4th of January, 1862; that it has never been enforced, or attempted to be enforced; that the first and only attempt, if it may be called an attempt, at enforcing, which it is not, was on the part of the Joint Committee having charge of the Common, which "Resolved, that no permit for preaching on the Common shall be granted;" that an absolute prohibition from that moment was resolved upon; and that it was not carrying out this ordinance, as a regulation, but using this ordinance to prohibit and put an end to public preaching on the Common; and that public

preaching has been permitted up to this time, and that it has been under the protection of the police; also, that since this first complaint was made, and since the hearing upon it in the Court below, the Joint Committee of the City Council, having charge of the Common, have rendered two permits, one to the Young Men's Christian Association, and one to the Salvation Army, or members of it, and that those are the only permits that have ever at any time been granted to preach upon the Common.

And the counsel for the defendant asked the Court to rule that, upon proof of the foregoing facts, the ordinance under which said complaints are made, has become and should be declared by this Court to be obsolete; but the Court ruled that the evidence offered was immaterial and incompetent, and excluded it, and refused the ruling requested: to all of which the defendant excepted.

The defendant, by his counsel, also offered to prove: that there was no disturbance of the public peace, and no obstruction of others in their religious worship, and that the character and tendency of the preaching there by the defendant was the promotion of piety and morality; but the Court excluded the testimony, and the defendant excepted.

The defendant called, as a witness, Daniel W. Bul-lard, who testified: that he had charge of the Clerk's office of the Superior Court in the County of Suffolk for Civil Business, and had held the position for nearly twenty years; and that he had examined the records there in respect to whether, or not, there are ordinances of the City of Boston recorded there.



At this point the attorney for the government said he would admit that the ordinance in question was not recorded. (Sect. 11 of Chapter 37 of the Revised Ordinances.)

The attorney for the government asked Mr. Bullard, "Has the City of Boston ever recorded any?" And the witness answered, "I found three recorded since January, 1862." "But this is not?" asked the attorney for the government. The witness replied, "No, sir."

The defendant, by his counsel, read and put in evidence Sect. 11, on page 121 of Laws and Ordinances of Boston, 1863, and "An Ordinance relating to the Common, Public Garden, Public Squares, and Common Lands, passed January 4, 1862," which may be referred to as part of these exceptions; also Sect. 2 of Chap. 1 of the Revised Ordinances of the City of Boston, which may be referred to as part of these exceptions; also the "Table" on pages 177 to 188 inclusive, in said volume of Revised Ordinances of the City of Boston, which may be referred to as part of these exceptions.

The defendant requested the Court to rule and instruct the jury as follows:—

1st. That it is the duty of the jury, on all the evidence in the case, to render a verdict of not guilty.

2d. That the acts alleged and proved against the defendant constitute no offence for which he is liable under this complaint.

3d. That the defendant had the right to preach on the Common, and to read from the Bible on the Com-

mon, and to sing religious hymns on the Common, as in said complaint he is alleged to have done.

4th. That the defendant had the right to preach on the Common, and to read from the Bible on the Common, and to sing religious hymns on the Common; provided that he did not disturb the public peace, or disturb others in their religious worship; and the complaint in this case does not allege, and the government has not offered any evidence, to show that the defendant did disturb the public peace, or obstruct others in their religious worship.

5th. That the ordinance under which this complaint was made, to wit: Sect. 11 of Chap. 37 of the Revised Ordinances of the City of Boston, is invalid, void, and of no effect, because the same has not been "Published two weeks successively in three daily newspapers published in the city, such newspapers to be designated by the City Clerk," as required by Chap 1, Sec. 2, of said Revised Ordinances; and also because said ordinance has not been entered and recorded in the office of the Clerk of the Superior Court for Civil Business in the County of Suffolk, as required by the Public Statutes, Chap. 27, Sec. 21.

6th. That said ordinance, to wit, Sec. 2 of Chap. 37 of the Revised Ordinances of the City of Boston, as passed prior to December 31, 1882, to wit, January 4, 1862, was obsolete, and that the same had been practically, and in fact, waived, abandoned, set aside and annulled prior to the time of the commission of the acts complained of.

7th. That said ordinance is not needful and salutary, and is not reasonable; that it is not reasonable as a

regulation respecting "The care, custody and management" of the Common; nor as a regulation respecting the use of the Common for the public preaching of the Gospel, and for the reading of the Bible and the singing of religious hymns; and that said ordinance is unwarranted by the Charter of the City of Boston, and is without any legal constitutional authority or sanction.

8th. That said ordinance is in derogation of the rights secured to the defendant by Article II of the Bill of Rights in the Constitution of Massachusetts, and therefore is null and void.

9th. That Massachusetts is a Christian Commonwealth, and its Constitution and Bill of Rights, and all of its valid laws, are based on the Bible and Gospel of Jesus Christ; and that the right to publicly preach said Gospel in all public places and on Boston Common is secured and regulated solely by the Constitution and Bill of Rights, which constitute the paramount law of this State, and cannot be nullified by the City Council of Boston by virtue of its charter authority and power to have "The care, custody, and management of all property of the city, with power to lease or sell the same, except the Common and Faneuil Hall," and the "Power to make all such needful and salutary by-laws, or ordinances, not inconsistent with the laws of this Commonwealth, as towns, by the laws of this Commonwealth, have power to make and establish;" that said ordinance could not be made by virtue of an implied power in the City Council to make by-laws, or ordinances, in the nature of police regulations; that no ordinance can be made by the City Council of Boston which may take away or infringe the rights of the

defendant as secured to him by the Bill of Rights and Constitution of this State.

But the Court declined to rule and instruct as requested, and refused each and all of said requests. To all of which rulings and refusals the defendant excepts, and now prays that his exceptions may be allowed.

The jury returned a verdict of guilty.

WILLIAM F. DAVIS,

By his Attorney,

J. F. PICKERING.

July 9, 1885. Allowed.

P. EMORY ALDRICH,

*Justice of Superior Court.*

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RECORD.

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This complaint was entered in said Superior Court, at the last June term, when the said William F. Davis was set at the bar, and for trial put himself upon the Country, and the Commonwealth did the like by its attorney, Oliver Stevens, Esquire.

A jury was empanelled and sworn to try the issue, to wit: George F. Mullet, foreman, and eleven of his fellows; who, after hearing and understanding all matters concerning the same, returned their verdict, and on oath said thereof that the said Davis was guilty.

This complaint was thence continued to the present July term, and now said Davis, by his attorney, files

exceptions to the rulings of the presiding justice, time having been extended for filing the same; and said exceptions, being examined and found conformable to the truth, are allowed, and are ordered to be transmitted to the Supreme Judicial Court, and said complaint is ordered to stand continued, to await the determination of the Justices of said Court.

All of which appears of record in said Superior Court.

Attest, JOHN P. MANNING, *Clerk.*

[2.]

## SUPREME JUDICIAL COURT.

SUFFOLK, ss.

NOVEMBER, 1885.

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COMMONWEALTH vs. WILLIAM F. DAVIS.

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## BRIEF FOR THE COMMONWEALTH.

The rulings asked for by the defendant were properly refused by the Court.

Every city and town duly established has the right and duty to make by-laws and ordinances for the proper protection of the property of the town or city, and for the rights of inhabitants thereof; it is an inherent right to their existence.

Dillon on Municipal Corp. (2d ed.) § 250.

Such by-laws and ordinances, to be legal and valid, must not be inconsistent with the general laws of the Commonwealth. They must not be unreasonable, or in restraint of trade, but should be such as are required for the public health or public safety. While the Court has unquestionably the power to deny effect to an unreasonable by-law or ordinance, "it is, however," in the language of Dewey, J., in *Commonwealth v. Robertson*, 5 Cush. 442, "a power to be cautiously exercised."

The ordinance in question prohibiting, without a permit, preaching or lecturing on the Common, in the City of Boston, is such a "needful and salutary by-law" as is not inconsistent with the laws of the Commonwealth.

It is not unreasonable, not in restraint of trade, nor does it infringe the rights guaranteed by the Constitution, but is "a legal restraint upon the few for the benefit of the many"; a precaution securing the safety and rights of all, and an absolute prohibition to none. In order that a person may preach or lecture on the Common, thereby gathering about him a large concourse of people of all grades and temperament, it is required, as a condition precedent, that he obtain, from those in authority a permit. This prerequisite is very obviously a reasonable one. It is not only for the protection of citizens not directly interested therein, but equally for the protection of the preacher or lecturer himself.

If one preacher or one lecturer of one denomination or sect is allowed to preach or lecture without first obtaining a permit, all must be so allowed, as ordinances that discriminate between classes or persons are clearly unreasonable and void. Therefore, if one, all must be allowed; and if all, and no discrimination is shown, all might desire and claim the same time, place and position. The result is readily foreseen. The ordinance in question was absolutely indispensable; without such a police regulation great disorder might arise. Religious liberty is not infringed, but religious license is prohibited. No subject is hurt, molested or restrained in his person, liberty or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience, but he is required to do so in a

manner that doth not disturb the public peace, or obstruct others in their religious worship, as is provided by the Declaration of Rights of this Commonwealth.

It was not necessary that any breach of the peace should have taken place in order that a violation of the by-law should occur. The evidence offered by the defendant as to the practice of allowing preaching on the Common was properly excluded; it was collateral and incompetent.

The ordinance under which the defendant was convicted has never been repealed, set aside, annulled, or abandoned, and it is not obsolete. An ordinance cannot become obsolete; it remains in force until repealed.

Dillon on Municipal Corp. (2 ed.), § 249.

By chap. 27, § 21, of the Public Statutes, it is provided that: "Before any by-law takes effect it shall be approved by the Superior Court, or in vacation, by a justice thereof, and shall with such approval be entered and recorded in the office of the clerk of the courts in the county where the town is situated." . . . So much of this section as relates to the approval of the court was originally passed in 1785, chapter 75, § 7, and it is to be found, in substance, in all revisions of the general laws of the Commonwealth. The portion of the section relating to the recording of the ordinances and by-laws was originally passed in 1855, chap. 222, § 2. Section first of said chapter provides that, "*In all cases in which it is necessary* to procure the approval of the Court of Common Pleas of an ordinance" . . . the approval of a single justice is sufficient; and section second, aforesaid, provides that "Before *such* ordinance



or by-law shall take effect it shall be recorded" . . . (as in § 21, chap. 27, Pub. Stat.) Now the charter of the City of Boston, under the authority of which the ordinance was passed, under which ordinance the complaint in this case was made, was originally passed in April, 1854, chap. 448 of the Acts of that year. Section thirty-five provides that "All the powers heretofore by law vested in the town of Boston, shall be vested in the Mayor, Aldermen and Common Council of the said city. . . . More especially they shall have power to make all such needful and salutary by-laws and ordinances, not inconsistent with the laws of the Commonwealth, as towns by the laws of this Commonwealth have power to make and establish, and to annex penalties not exceeding fifty dollars for the breach thereof; *which by-laws and ordinances shall take effect and be in force from and after the time therein respectively limited, without the sanction or confirmation of any court or other authority whatsoever.*"

This last clause, providing that no sanction of any court or other authority is necessary to the validity of an ordinance passed by the Common Council, being inconsistent and repugnant to the provision requiring such approval, passed in 1785, and found in the Revised Statutes, chap. 15, § 13 (1836), is in accordance with the decisions in *Goddard v. Boston*, 20 Pick. 410, and *Somerville v. Boston*, 120 Mass., 575, and, so far as the ordinances of the City of Boston are concerned, a repeal of said provision. Therefore the validity of the ordinance in question was in no wise affected by the fact that it was not approved by the court, as is re-

quired in other cases under § 21 of chap. 27 of the Pub. Stat.

But it was not recorded.

And the statute requiring this to be done was passed subsequently (1855, ch. 222, § 2) to the passage of the act of the charter of the City of Boston (1854, ch. 448), in which no approval or authority was necessary to the validity of its ordinances, and, hence upon the face, would be, in its turn, a repeal of said provision just referred to. However, a careful reading of the entire act of 1855 shows the contrary conclusion to be the correct one. To illustrate: Section first provides that "*in all cases in which it is necessary* to procure the approval of the court" a single justice will be sufficient. Section second provides: "*Before such ordinances,*" to wit, those in which it is necessary to procure the approval of the court, shall take effect, they shall be recorded. But it has been shown that the first section of this chapter is and has been since the granting of the charter, in 1854, inapplicable, and in no wise affects the ordinance in question: that this is one of the cases when such approval is not necessary, and, as the second section is dependent on the first for its force and effect, and without it is of no use or validity, it, too, is also inapplicable to the ordinance in question. Hence, recording is not, in this case, a prerequisite to the validity of the ordinance.

In a word, the provisions in chap. 27 of the Public Statutes are inapplicable to the ordinances of the City of Boston, because of the provisions of its charter.

See *Commonwealth v. Brooks*, 109 Mass. 355.

But again, the ordinance was not published as is required by Public Statutes, chap. 27, § 23. This however, is not necessary. The provisions of the charter of the City of Boston, passed subsequently (as shown above) to the passage of this statute, nullifies its effect so far as applicable to the City of Boston.

This is true, although in § 2 of chap. 1 of the Revised Ordinances (1883) it is provided that "All ordinances shall be recorded . . . and, except when otherwise provided, shall be published." This provision is not a condition precedent to the validity of an ordinance; it is nowhere said that the ordinance shall *not take effect* unless or until recorded and published.

Said section is merely directory.

But admitting that such publication is necessary to the validity of the ordinance, the evidence conclusively shows that proper and sufficient publication had been had. Section 14 of the ordinance, passed Feb. 28, 1885, provided, that "No person shall deliver any sermon, lecture, address or discourse, on the Common, Public Garden, public squares or common lands of the city, without the permission of the said joint committee of the City Council." The ordinance was duly published. Mr. Augustus N. Sampson, city clerk of the City of Boston, so testified, and his testimony was uncontradicted. Section 11 of chapter 37 of the Revised Ordinances of the City of Boston, under which this complaint was found, provides: "No person shall, except by the permission of the said committee [Committee of the City Council on Common and Public Grounds], deliver a sermon, lecture, address, or discourse on the Common or other Public Grounds." Section 3 of chap-

ter 1 of the same Revised Ordinances provides, that  
“The ordinance contained in this chapter and in the  
fifty-two chapters following shall be known as the  
‘Revised Ordinances,’ and, so far as their provisions  
are *the same in effect* as those of previously existing or-  
dinances, they shall be construed as continuations of  
those ordinances. . . .”

Now, the 11th section of chapter 27, under which the  
complaint was found, is exactly *the same in effect* as  
section 14 of that passed in 1870, which was shown to  
have been published, and, hence, being the same in  
effect, is but a continuation of said ordinance of 1870,  
and should be so construed. Therefore § 11, chap. 27,  
being a continuation of, and the same in effect, as the  
ordinance of 1870, it is, in law, that ordinance, and it,  
as has been shown, was duly published. The defen-  
dant’s fifth request, as well as the others, was properly  
overruled.

Respectfully submitted by

EDGAR J. SHERMAN,  
*Attorney General.*

[ 3. ]

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT.

*SUFFOLK, ss.*

*NOVEMBER TERM, 1885.*

COMMONWEALTH *vs.* WILLIAM F. DAVIS.

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DEFENDANT'S BRIEF.

If the City Council of Boston had the right to make the ordinance under which these complaints were made — Revised Ordinances of the City of Boston, chap. 37, Sec. 11—which the defendant denies—then said ordinance is invalid, void, and of no effect:—1st. Because it was never published; 2nd. Because it was not recorded in the office of the Clerk of the Superior Court for civil business in the county of Suffolk.

Sections 2 and 3 of chap. 1 of said Revised Ordinances are as follows :

“Sect. 2. All ordinances of the city shall be recorded at length by the city clerk in a book kept by him for the purpose, and, except when otherwise provided, shall be published two weeks successively in three daily newspapers published in the city, such newspapers to be designated by the city clerk.

“Sect. 3. The ordinances contained in this chapter and in the fifty-two chapters following, shall be known as the Revised Ordinances, and so far as their provisions are the same in effect as those of previously existing ordinances they shall be construed as continuations of those ordinances,

but subject to the said limitations, and to the provisions of the next sections, all ordinances of the city heretofore in force are hereby repealed."

These complaints were made under the following ordinance:

"No person shall, except by the permission of the said committee, deliver a sermon, lecture, address, or discourse on the Common, or other public grounds."

Revised Ordinances, chap. 37, sec. 11.

1st. It was for the government to prove this ordinance, and to show that all of the acts requisite to make it a valid ordinance had been performed; and this it did not do. The only evidence offered by the government in relation to this matter was given by the city clerk, who testified that "the ordinance under which these complaints are made—sec. 11 of ch. 37 of the Revised Ordinances of the City of Boston—was passed, but it has not been published in any newspaper." Exceptions, p. 2.

The government should have shown—was bound to show—that this ordinance had been published as required by, and in compliance with, Sec. 2, ch. 1 of said Revised Ordinances: also, that it had been "recorded at length by the city clerk in a book kept by him for that purpose;" also, that it had "been published two weeks successively in three daily newspapers published in the city," or that, in respect to *this* ordinance, it had not been so published in newspapers, because the *publication* of *this* ordinance had been "otherwise provided," and *how* it had been "otherwise provided" should have been shown, or, at least the *fact* that the publication of this ordinance had been "otherwise provided;" also, that this ordinance was recorded in the office of the clerk of the superior court for civil business in the county of Suffolk, as the statutes of this State require. Public Statutes, ch. 27, sec. 21. General Statutes, ch. 18, sec. 14. Not only did

the government fail to prove these things, but it affirmatively appeared that none of these things were done. See Exceptions, pp. 2, 3.

2d. It cannot be claimed with any reason, nor with any plausibility even, that by the provision in sec. 3 of ch. 1 of said Revised Ordinances, "The ordinances contained in this chapter, and in the fifty-two chapters following—so far as their provisions are the same in effect as those of previously existing ordinances, they shall be construed as continuations of those ordinances,"—the publication of this ordinance, sec. 11, chap. 37, Revised Ordinances—is "otherwise provided" for, because said sec. 3 has no reference or relation to publication.

If this ordinance—sec. 11, ch. 37, Revised Ordinances—is to be "construed" as a "continuation" of "previously existing ordinances," it is one of the "all" that must be published and recorded, as provided by said sec. 2 of ch. 1: and it is an ordinance which must be recorded in this office of the clerk of the superior court.

The statute provisions relating to this branch of the case are the following:

Charter of the City of Boston, from Sect. 35: "More especially they" (the City Council) "shall have power to make all such needful and salutary by-laws or ordinances, not inconsistent with the laws of this commonwealth, as towns by the laws of this commonwealth have power to make and establish, and to annex penalties not exceeding fifty dollars for the breach thereof, which by-laws and ordinances shall take effect and be in force from and after the time therein respectively limited, without the sanction or confirmation of any court or other authority whatsoever."

Acts of 1854, chap. 448.

"Towns may make for the following named purposes, in addition to other purposes authorized by law, such necessary orders and by-laws, not repugnant to law, as they may judge most conducive to their welfare, and may affix penalties, not

exceeding twenty dollars for one offence, for breaches thereof:—

“For directing and managing the prudential affairs, preserving the peace and good order, and maintaining the internal police thereof.”

Pub. Stats. chap. 27, sec. 15, page 228.

“Before any by-law shall take effect it shall be approved by the superior court, or in vacation by a justice thereof, and shall, with such approval, be entered and recorded in the office of the clerk of the courts in the county where the town is situated, or in the county of Suffolk, in the office of the clerk of the superior court for civil business.”

Pub. Stats. chap. 27, sec. 21.

“All by-laws made by a town shall be published in one or more newspapers printed in the county where the town is situated.”

Pub. Stats. chap. 27, sec. 33, page 229.

“Chapter twenty-seven, and all other laws relating to towns, shall apply to cities, so far as they are not inconsistent with the general or special provisions relating thereto; and cities shall be subject to the liabilities, and City Councils shall have the powers of towns.”

Pub. Stats. chap. 28, sec. 2, page 241.

“The word ‘ordinance’ as applied to cities, shall be synonymous with the word ‘by-law.’”

Pub. Stats. ch. 3, sec. 3, cl. 15, page 59.

3d. The ordinance under which these complaints were made did *not* take effect and have force from and after its “passage;” and *it never took effect*. The charter provision, that “by-laws and ordinances shall take effect and be in force from and after the time therein respectively limited, without the sanction or confirmation of any court or other authority whatsoever,” relates only to the matter of “sanction or confirmation.” But waiving this, “the time therein respectively limited” must be held to mean limited in conformity



to, and in compliance with, the statutes which declare that "Before any by-law" or "ordinance" takes effect, it "shall be entered and recorded in the office of the clerk of courts in the county where the town is situated, or in the county of Suffolk in the office of the clerk of the Superior Court for civil business." The "power" granted is to *limit* the time when by-laws or ordinances shall take effect, in conformity with the statute, and not contrary to, or in avoidance or defiance of, said statute. .

It cannot be held, or claimed, that the City Council of Boston has in this matter acted contrary to said statutes, but it must be presumed that the acts done were intended to be and are in conformity with the requirements of said statutes. The ordinances which were before the court in this case show that the ordinance—sec. 11, ch. 37, Revised Ordinances—was limited to go into effect when recorded and published as provided by sec. 2, ch. 1, Revised Ordinances. No other time when this ordinance should take effect was shown. This time affirmatively appears. And we must also assume that it was not intended to go into effect "before" it had been recorded in the office of the clerk of the Superior Court, as required by the most express and positive language of the Gen. and Public Statutes which make such record a *condition precedent* to the taking effect of any by-law or ordinance in this commonwealth, and which most manifestly is *not* "directory."

The statutes which provide that "All by-laws made by a town shall be published in one or more newspapers printed in the county where the town is situated"—Gen. Stats. ch. 18, page 16; Pub. Stats. ch. 27, sec. 23—make such publication by cities, as well as towns, and by the City of Boston, a condition precedent to the taking effect of any by-law or ordinance in this commonwealth, and said statutes are *not* "directory." But even if it were held that the statutes relating to publication were "directory," then the City of

Boston is bound to a compliance with the law which itself has made providing for publication in sec. 2 of chap. 1 of said Revised Ordinances, and it surely cannot be claimed that this is "directory."

The legislature, by the provisions in sec. 35 of said charter, and by its General and Public Acts—which must be construed together—provided and specified the means by which the by-laws or ordinances of the city of Boston should *be made known to the public*; and those means are, by recording in the clerk's office of the Superior Court for civil business, in the county of Suffolk, and by publication in one or more newspapers in Boston; and it will not do to say that the acts making this provision are "merely directory;"—that the by-law "takes effect from and after its *passage*;" and that a by-law that has been "passed," is valid, and binding on the public, although it was never recorded or published; that is, although it is a *secret* act—a *private* act—an ordinance *never promulgated and made known to the people*. This view of the powers of a City Council, or of a Legislature even, has never yet prevailed in this country. The people have the right to know what the laws of this State are, and also what the laws of the City of Boston are.

A citizen of Boston, desiring to know what power the City Council has to make laws, searches the statutes and the City charter, and from them he learns that the by-laws or ordinances are to be recorded in the clerk's office of the Superior Court for civil business, and he goes to that office, and being a preacher, and desiring to preach on the Common, and learning that there is no ordinance recorded there relating to that matter, he proceeds and preaches on the Common, when he is arrested, and told that such an ordinance had been "passed" by the City Council, and that by going to the City Hall and paying two dollars for a book entitled "The Revised Ordinances of the City of Boston," he can find it printed in that book; and in this way only does the City promulgate and

make known to him the fact that this ordinance has been "passed."

Commonwealth vs. Brooks, 109 Mass. 355, does not militate in the least against the positions herein taken.

4th. The ordinance under which these complaints were made—sec. 11, ch. 37, Rev. Ord.—is invalid, because it was not recorded in the office of the clerk of the Superior Court for civil business, in the County of Suffolk.

In support of this proposition, I refer to what has been said under the preceding head, and further say:—

By sec. 35 of its charter, the City of Boston is made exempt from the provision of the statutes requiring towns and cities to obtain the approval—"sanction or confirmation"—of the Superior Court, or a justice thereof; but the City of Boston is *not* made exempt from the provision of the statutes which requires, as a condition precedent to the taking effect of any by-law or ordinance, that by-laws or ordinances shall be recorded in the office of the clerk of the Superior Court for civil business in the county of Suffolk.

If it shall be said, "the provision in sec. 2, chap. 1, Rev. Ord., that all ordinances of the city should be recorded at length, by the city clerk, in a book kept by him for the purpose, is a 'SUBSTITUTION' for the provision of the statutes which requires that by-laws, or ordinances, shall be recorded in the office of the clerk of the court," then I answer, that the City Council of Boston *had no authority* to make such substitution, and could not make it; and further, this provision in the ordinance was not made as a "substitution," but as an *addition* to the means provided by the Legislature to *make known to the public* the ordinances made by the City Council, and to be kept by the people.

But I have further to say, that there is no evidence in the case that the city clerk kept any book for the purpose of recording "all," or any, ordinances of the city, or that any ordinances of the city were recorded at length by the city

clerk; and there is no evidence that the ordinance under which these complaints were made was recorded in any book kept by the city clerk; and neither is there any evidence that the ordinances contained in sec. 2 and sec. 3 of chap. 1 of the Revised Ordinances were ever published or recorded; but on the contrary, the evidence in the case makes it manifest that these ordinances have never been published — nor recorded.

In fact, and the evidence in the case warrants the statement, there has never been any publication whatever of any of these ordinances.

*DE BENE ESSE.*

The Revised Ordinances have not been *printed*, even, except in compliance with the order which may be found on the page following the title page in the volume of said Ordinances, viz :

“ In Board of Aldermen, Jan. 8, 1883.

Ordered, That the superintendent of printing, under the direction of the committee on printing, be authorized to have printed and bound fifteen hundred copies of a volume containing the Revised Ordinances and all ordinances already passed by the present City Council, and such special statutes as relate to the City of Boston, together with a suitable index to the same, and to furnish each member of the City Council with three copies of said volume, the expense not exceeding twenty-five hundred dollars, to be charged to the appropriation for printing.

Passed in Common Council Jan. 4, 1883.

Came up for concurrence. Read and recorded as above.

Approved by the Mayor Jan. 9, 1883.”

“ In Board of Aldermen, June 5, 1883.

Ordered, That the order in regard to the Revised Ordinances, approved Jan. 9, 1883, is hereby modified, so that the printing committee may issue the statutes and other documents in a separate volume.

In Common Council, concurred June 7, 1883.

Approved by the Mayor June 9, 1883.”

Each member of the City Council for 1883, 1884 and 1885 has doubtless received his "three copies," and future members will receive the same; but all other persons are required to pay the city two dollars for a copy of said volume.

By the above order it appears, that the distribution of all the copies was limited to members of the City Council, and there is no authority to sell it. Then the number printed — 1,500!

## II.

The ordinance under which these complaints were made is invalid and void, because the City Council of Boston had no right, power, or authority to make it.

1st. The right, power, and authority of the City Council of Boston to make by-laws, or ordinances, is wholly derived from its charter. All of its powers are by grant and express, and none can be implied. It has no right to make by-laws or ordinances in the nature of police regulation by virtue of an implied power to do so. All its acts in this respect must find warrant in the express power granted and confirmed by the charter.

2d. The charter grants no right or power to make this ordinance. By sec. 35 of the charter the City Council is empowered to make "such needful and salutary by-laws or ordinances, not inconsistent with the laws of this Commonwealth, as towns, by the laws of this Commonwealth, have power to make and establish." And towns are authorized "to make such by-laws not repugnant to the laws of the State for directing and managing the prudential affairs, preserving the peace and good order, and maintaining the internal police thereof, as they may judge conducive to the welfare of the town."

Gen. Stats. c. 18, sec. 11. Pub. Stats. c. 27, sec. 15.

3d. The power of the City Council of Boston, touching this matter, is limited to the making of needful and salutary ordinances for preserving the peace and good order.

4th. The ordinance under which these complaints were made, so far as relates to the preaching of the gospel and the worship of God, is not needful, and it is not salutary. It is not necessary for preserving the peace and good order, and its enforcement cannot be conducive to the welfare of the city. This ordinance is not needful, because the power and authority of the city government to preserve the peace and good order are ample without it, and it adds nothing whatever to that power and authority. The power to preserve the peace and good order does not depend in the least on this ordinance; it is full and complete without it. That the City of Boston has full and complete authority — as well as the duty — to preserve peace and good order on the Common and other public places of the city, and in all other places, public or private, without this or any similar ordinance to enable the city to do so, is too manifest to require argument. Notable instances might be cited in which the city, by virtue of this authority, has acted when the peace was disturbed.

Peace and good order were preserved on the Common, as elsewhere in Boston, without any ordinance relating to the Common and other public grounds until 1862; and since that time the peace has always been preserved without the use of the ordinance touching this matter.

The person who now preaches on the Common with a “permit” is just as much bound not to disturb the peace, as was the person who without permit preached there. The rights and duties of ministers preaching on the Common with permit, are precisely the same as those which pertain to ministers who preach there without permit. The city committee cannot by its “permit” authorize the minister holding it to

disturb the peace, or to obstruct others in their religious worship. All ministers, and all men, have *equal rights* under the law, and the City Council of Boston may not discriminate, and exclude from the exercise of their legal and equal rights persons who have done nothing to forfeit their rights, and who, if they offend against the peace and good order, may, without this ordinance, be arrested and tried and punished therefor.

This ordinance, as a peace-preserving measure, is a nullity, and not needful to preserve the peace and good order; but it gives a power in addition to and outside of the power to preserve peace and order, of a most objectionable and unwarrantable character.

There is no ordinance of the City of Boston against assault and battery on the Common and public grounds; it is not regulated, prohibited, or permitted by any ordinance; still, no man in his senses, before this ordinance was brought to light, would have thought that the police authorities had no lawful power to arrest a man for committing an assault on the Common, and to preserve the peace from disturbance by assault and battery committed there. There is no ordinance of the City of Boston against stealing and robbery on the Common and public grounds; nor against pocket picking, nor against duelling, murder and manslaughter; but I do not believe that, because of the lack of such ordinances, it can be even plausibly argued that persons who should commit these offenses, or any one of them, on the Common or other public grounds, would not be liable to arrest by the police of Boston.

There is no ordinance of the City of Boston against flirting, seduction, and other vices, on the Common and public grounds; but, for that reason, is there no law by virtue of which the police authorities of the city may arrest offenders and preserve the public peace and good order?

Feb. 28, 1870, the City Council passed the following

ordinance: "It shall be the duty of any police officer to remove from the Common, Public Garden, or any of the public squares or common lands, any person who is violating any law or ordinance, or is guilty of disorderly conduct." But this ordinance is not, even "in effect," carried into the Revised Ordinances; and when these were made, this was doubtless "omitted as obsolete," because not "needful."

The police authorities and officers of the City of Boston, in the exercise of the powers, and performance of the duties, imposed by the laws of the State, act as *public officers*, and not as officers of the city.

Buttrick v. City of Lowell, 1 Allen 172.

Walcott v. Swampscott, 1 Allen 101.

Haffor v. City of New Bedford, 16 Gray 297.

Barney v. City of Lowell, 98 Mass. 570.

Brimmer v. Boston, 102 Mass. 19.

Fisher v. Boston, 104 Mass. 87.

Hill v. Boston, 122 Mass. 344.

Cushing v. Bedford, 125 Mass. 526.

Lemon v. Newton, 134 Mass. 476.

McCarthy v. Boston, 135 Mass. 197.

It was the duty of this city, as of every other city and town in this commonwealth, to see that the laws of the State were enforced. The City of Boston had no right to neglect, or refuse to enforce, the laws of this State, or any law of this State, made in the interest of and to secure "law and order," in the interest of morality, peace, and good order. None of these things were or are dependent on, or at the mercy of, the men who may from year to year make the ordinances of the City of Boston; and because it was believed that the municipal and police authorities of Boston failed, neglected, or refused to see to it that the laws of the State were enforced in Boston, the legislature has taken the police power of the city out of the hands of the City Government, and placed it in the hands and control of officials of the State.

If the municipal authorities of Boston had passed fewer



ordinances—not needful and salutary—and had enforced the laws made by the legislature, they would not now be lamenting their loss of power to appoint policemen, and that the tax-payers of the city must pay the salaries of a board of Police Commissioners appointed by the Governor of the State.

5th. This ordinance is not “salutary.” To place in the hands of the joint committee of the City Council of Boston the power to determine who may and who may not preach the gospel on the Common, and, consequently, the time, terms, and conditions under which “permit” to preach there may be granted and obtained, is to establish in the City of Boston a *censorship of preachers and preaching*; and this can never be “salutary,” for it will surely tend to provoke, rather than to prevent, breaches of the peace and of good order.

Can it be held “needful and salutary” that the City Council of Boston, through fear that longer continuance of free public preaching on the Common may so offend anti-Christian elements, large and influential in municipal politics, that these may cause, or threaten to cause, disturbance of the peace, or at least disturb the city officials, shall now take control of the public preaching, and exercise a censorship of preachers and preaching which shall satisfy these elements? Can this censorship be needful for preventive purposes as a peace-preserving measure? Is this the way for the City of Boston to protect and preserve the equal rights of all its citizens, and to maintain peace and good order? For the City of Boston to anticipate that the continuance of free public preaching on the Common and other public grounds may be objectionable to some body, sect, or element, and that such objectors may at some future time disturb the peace and good order, unless such preaching shall be regulated, controlled, censored, by a committee of the City Council, is not needful and salutary, but it is the reverse of everything that is needful and salutary.

“Proclaiming” and “prohibiting” meetings in public places, from fear of disturbance of the peace and good order in the “old world” are limited to those of an exciting, revolutionary and political character; even in downtrodden Ireland, free religious meetings in public grounds are not “prohibited” or “proclaimed,” nor held by “permit.”

The City of Boston holds the Common and public grounds in trust for the use of the people, and to promote the moral as well as the physical well-being of the people of all classes, conditions, sects, and creeds; and the rights of all are equal.

Regardless of this ordinance, now, as before it was passed, the duty devolves on the city to protect all persons in the exercise of their legal and constitutional, their natural and inalienable rights, while in the use of the Common and public grounds, and to maintain peace and good order there; and these are to be secured by the arrest of those who disturb the peace and good order, and not by interfering with, disturbing and obstructing, those who, in the public exercise of their most sacred rights and duties, do not “disturb the public peace, or obstruct others in their religious worship.”

“Whoever wilfully interrupts or disturbs an assembly of people met for the worship of God, shall be punished by imprisonment in the jail not exceeding thirty days, or by fine not exceeding fifty dollars.”

Pub. Stats. ch. 207, sec. 21.

The operation of this statute is not limited to cathedrals, churches, halls, and private grounds, but it extends to and covers Boston Common.

6th. The ordinance under which these complaints were made, so far as relates to the preaching of the gospel and the worship of God, is inconsistent with the laws of this commonwealth, repugnant to the laws of the State, and contravenes the rights secured to the defendant by the Constitution and Bill of Rights.

"It is the right as well as the duty of all men in society, publicly, and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, provided he doth not disturb the public peace, or obstruct others in their religious worship."

Constitution of Mass., Bill of Rights, Art. II.

"If any worship was necessary to the good order and happiness of a community, it must be public worship. The worship of the cell and the cloister had nothing to do with society.

Debates in Mass. Convention of 1820, p. 349.

"In society," means all men in the state, city, or community, in common, acting together for a temporary or permanent purpose; not privately or alone.

"Publicity," openly, in public view, pertaining to the whole people, before the people at large; not in private, but in a place open to common use belonging to the public.

"Private," denotes what belongs to an individual, to a family, to a company or corporation. See Dictionaries, Webster and Worcester.

At the adoption of the State Constitution in 1780, and until the 11th amendment was adopted in 1833, the State provided for the public preaching of the gospel, and then the people had public religious teaching; but since 1833, no public preaching has been provided, and we have had no public churches.

For more than fifty years the masses of the people have not been provided with public religious teaching. All our churches are now private, and not public places of worship. There is not a church in Boston to-day in which the masses of the people have any rights. Churches are public in no

sense other than a theatre or hall are public, and attendance at the latter is often less costly than at the former.

“The pew-holder has an exclusive right to occupy his pew; and to maintain trespass, or writ of entry, against any one who disturbs him in his seat.”

Chief Justice Parker, in *Gay vs. Baker*, 17 Mass. 435.  
See also *Jackson vs. Rounseville*, 5 Met. 127.

Pews are personal property. Pub. Stats. ch. 38, sec. 42.

It will not now do to say that by “publicly” is meant our present churches, or the places where our religious societies worship. The Bill of Rights, relates to public places. The rights secured are not those which every man then had, and now has, to worship God privately in his own house, on his own private property, for this did not and does not depend on the Bill of Rights; and the Bill of Rights does not relate to private worship. It relates wholly to public worship; worship in public places, in company with others, in a public manner, free and open to all people.

To preach the gospel on the Common is the right of the defendant, subject only to the condition or regulation prescribed in the Bill of Rights that he shall not “disturb the public peace, or obstruct others in their religious worship.” It is not a right or privilege which the City of Boston can give or take away.

The public worship of God includes preaching, praying, singing, and reading the Bible.

The right to publicly worship God is not only declared and secured in the Bill of Rights, but the exercise of this right is thereby regulated; and there can be no other regulation of it, neither by the City Council of Boston, nor by the legislature, directly or indirectly.

The City Council cannot, on the pretext of regulating the “use of the Common,” regulate the right to publicly worship God, and to preach the gospel of Jesus Christ.

It has been said in this case, and it may be repeated here, that this ordinance "is not designed to interfere with the freedom of speech ; it is not designed to interfere with any man's right to preach the gospel at all ; that is not the object of it. The object of it is, to preserve the peace and good order ; not that this particular individual created any disturbance, but upon general principles, for the purpose of regulating and preventing disorder and breaches of the peace on the Common, this ordinance has been passed. If he may do it, then all the other preachers in the city may do it, and we may have the Common entirely occupied every Sunday in the year, not only by one congregation, but with 40, or 50, or 100. The question is, whether that would not be likely to lead to disturbance of the peace, and therefore the city government has chosen to pass this ordinance, so that they can regulate it. It may be said, if a license is given to preach, there might be the same result ; not so, because it is within the power of this committee to license. They would not license everybody ; they would not license 40 or 50 men to do it on the same day."

The case for the Commonwealth cannot probably be better stated than in the above quotation.

The needlessness and uselessness of this ordinance to preserve the peace and good order, and the impolicy of it on the plea of "regulating and preventing disorder,"—which is yet to be so much as threatened, even—have already been fully shown, as well as its subversion of the rights secured by the Bill of Rights.

The assumption that the preaching of the gospel—peace and good-will to man—on the Common would "be likely to lead to disturbance of the peace" is unwarrantable, and an unjustifiable reflection on the Christian ministers of our day.

There can be no stronger presumption of law stated in this court than that the preaching of the gospel is the greatest

and best promoter of peace and good order. All the peace, order; and good that we enjoy have come from the free, open, public, and unrestrained preaching of the gospel, from the public teaching of piety and morality, on which rest the very foundations of our State. The principles of the Christian religion are part and parcel of our laws, and these all tend to peace and good order.

But suppose "other preachers" may "do it"? that 40 or 50 or 100 of our preachers should follow the example of the defendant, and "every Sunday in the year," leaving their almost empty churches, should proceed to the Common, and finding the people there, should proceed to worship God, and preach, teaching piety and morality, not disturbing the public peace, or obstructing others in their religious worship,—surely good, and not evil, must be expected to result therefrom. The thought of the possibility of such a thing as this happening ought not to be greatly deplored; and it cannot be by Christian men. It would bring the Common to its best possible use, and prove the best preventive of disturbances from the "unchurched" and "dangerous" classes, concerning whom thoughtful people are now anxious.

In the first place, there is no reason to fear that 40, 50, or 100 of our preachers may "every Sunday in the year," or *any* Sunday in the year, preach on the Common; and secondly, it would be the very best thing that could happen if they should do so. It would be worth much more than it would cost if the city should pay these preachers to do it, and if need should ever be, pay a few extra policemen to see that peace and good order were observed.

In a single district of London, eighty men have preached the gospel to the people in the public streets in one evening; and I have read an address made by Lord Shaftesbury to the Open Air Mission, in which he gave an account of the great good accomplished by such preaching.

Washington is supposed to be a little less liberal—less

good—than Boston, but in that city street-preaching is common, and I have read in a religious newspaper that a Washington policeman has sometimes served as a street preacher.

The assertion that such worship and preaching would “be likely to lead to disturbance of the peace” is “inconsistent” with Art. 11, Mass. State Constitution, which says, “The public worship of God, and instructions in piety and morality, promote the happiness and prosperity of a people, and the security of a republican government.”

“Property is made more secure, both by the education of children, and the moral and religious instruction of adults.”

By the court, in *Amesbury Nail Factory Co. vs. Weed*,  
17 Mass. 54.

“The end of all political struggle is to establish morality as the basis of all legislation.” (R. W. Emerson.)

One of the ablest of our “Freethinkers” has said: “That religion, pure and simple, is conducive to morality, and is a strong, nay, the strongest, conceivable support of social order and law, is too plain to be said.” (O. B. Frothingham, in *Beliefs of the Unbelievers*: “The Despotism of Faith,” p. 16.)

“It must never be forgotten that religion gave birth to Anglo-American society. In the United States, religion is therefore commingled with all the habits of the nation, and all the feelings of patriotism. . . . When the religion of a people is destroyed, doubt gets hold of the highest portions of the intellect, and half paralyzes all the rest of its powers.” (De Tocqueville, vol. 2, pp. 4, 21.)

The assertion that this ordinance “is not designed to interfere with the freedom of speech,” that “it is not designed to interfere with any man’s right to preach the gospel at all,” is unwarranted. Sufficient has been said to show that it is not designed or calculated to accomplish anything else. This is precisely what it has done in these cases; and this is why

this case is in court. The defendant is not here because he disturbed the peace, or offended against the laws in any way. It is not because he has done harm, but because he has done good, that he is here. No harm has been found in him. He is here because he says, "AGAINST THE FREE PUBLIC PROCLAMATION OF THE GOSPEL OF JESUS CHRIST IN BOSTON, THERE IS AND THERE CAN BE NO LAW." He is here because "Religious liberty is absolute freedom of opinion and worship, a vested right of conscience, not derived through any grant of the civil power;" because "liberty of opinion, liberty of worship, liberty in all matters pertaining to religion, is not a privilege created or conceded by the State, but is a right inherent in the personality of the individual conscience; and the State is pledged not to interfere with that right." (J. P. Thompson, D.D., in *Church and State*, pp. 12, 13, 14.) And because "It is not lawful for any State in this Union to make any law which may restrain the free expression of religious belief, or the free exercise of religion and religious worship, according to the dictates of the conscience." (Cooley, *Const. Lim.*, 469.)

He is here because he cannot commit his conscience to the keeping of the joint committee of the City Council of Boston, and accept a commission to preach when, where and how they may see fit to "permit" him.

To preach the gospel on the Common is the right of the defendant, subject only to the condition—the regulation—that he shall not disturb the public peace, or obstruct others in their religious worship: it is not a right or privilege which the City of Boston can give or take away.

If this ordinance is valid, the city committee may, in its discretion, determine the conditions on which its "permit" shall be given, and then withhold, or grant and revoke at its pleasure; it may, in fact, determine who may and who may not preach; dictate the time, the theme of discourse, and the text. A Mormon council and committee — a danger quite as



reasonable to anticipate as disturbance of the public peace from preaching on the Common — might permit only Mormons to preach — and the Book of Mormon might be made to take the place of the Bible ; or some other sect being in a majority in the City Council, might act in a manner quite like this.

With this state of things made *more than possible*, it is not true that this ordinance “is not designed to interfere with the freedom of speech ;” that “it is not designed to interfere with any man’s right to preach the Gospel at all ;” and that this case “raises no question of the right to preach the Gospel generally ; and the question is precisely the same as if a man had delivered an address on the Common on the subject of geology, or any other question of science or art.” As has been said, and may be repeated in this case, the sacred right and duty of men “in society” to “publicly” worship God, declared and secured in the Bill of Rights, are *not* the same as, and are not to be compared with, the secular rights of artists, scientists, and geologists, which are not so declared and secured. And the same is true in respect to “cranks” and “circuses,” and all other classes or parties of whom it has been said that “they have just the same rights on the Common that preachers have.” In place of free, public, religious instructions, the City of Boston now gives its citizens Sunday amusements on the Common at public expense, and fears the effect of free public preaching ; and educated gentlemen do not know the difference between the piety and morality of Christ, and that of a “Wild West” show or a circus ; and wise writers wonder at the increase of vice and crime, and deplore the spread of infidelity and atheism. More than music, more than pleasure, more than physical comfort, do the people of Boston need free, public, unrestrained preaching on the Common.

It is the God-given and inalienable right of the defendant to obey the call of his Master, and go out and preach to the

people in public places. The command of Christ is to go to the people, go where the people are, and his disciples have ever done this. Christianity was founded in free, public preaching to the common people, out of doors, in public places, and it has been continued in the world in the same way. Every great advance-step has been begun and carried forward by free, public, outdoor preaching in public places. The preaching of the gospel and the worship of God are not limited to those who are able and willing to build a church or hire a hall.

“The American Christian’s pew is his castle, if he please to make it such, and no stranger may with impunity enter it” (Bishop Dudley in *Century*, June, 1885, p. 279); and few of those who are unable to maintain such a castle will intrude where they may not with impunity enter, and where, if they do enter, they must humble themselves at the feet of the lofty and scornful sexton. “The religious club may, like other associations of that species, grant admission to the privileges of its club-house only by card, and nobody has a right to complain. But when the religious club sets up a claim to be the visible kingdom of God on earth, whose mission and ground of being are the making known the glad tidings to the poor and the outcast, what absurdity of contradiction is such exclusive selfishness.” (Bishop Dudley, *Century*, June, 1885.) “The advantages of this system are, that it secures the personal interest of the members in their particular church, and that it makes it a family institution. Families that go always to the same church and sit together in the same pew, regard the church as a *home*; and children grow up with this home-attachment to the house of God. . . . The disadvantage of this pew-system is, that it tends to the exclusion of the poor; and not the poor only, but of persons of moderate income, who cannot meet these large demands for the expenses of public worship in the great cities. . . . The experiment of ‘free churches’ built for their special use,

has failed ; because the pride of even the humblest American rebels against advertising his poverty and accepting a gratuity." (J. P. Thompson, D.D., in *Church and State*, pp. 102, 104.)

These are the people who in the summer time—but not “every Sunday in the year”—may be found on the Common and public grounds on Sunday, and not at church ; and these are the people that the defendant is arrested for preaching to,—for making known the glad tidings of peace on earth and good-will to men,—and on the ground that it may, in the minds of the City Council of Boston, some time or other, lead to disturbance of the peace by badly disposed persons ; and this is the “call” of the defendant, which he must obey, whether men shall hear or whether they shall forbear, and which, it is asserted, is no higher than the calling of an artist, a scientist, or a geologist. And we are told that the denial and suppression of this God-given right “raises no question of the right to preach the gospel generally,” and that doing this “is not designed to interfere with freedom of speech ; it is not designed to interfere with any man’s right to preach the gospel at all.” Then this ordinance is remarkable for producing as *its only effect* that which it is *not* “designed” to produce. Surely, such an ordinance cannot be claimed to be “needful and salutary,” or consistent with the laws of this Commonwealth.

7th. Consider where the doctrine on which this ordinance stands might lead. If the City of Boston may make this ordinance under the claim of right to regulate the use of the Common and public grounds (“The City Council shall have the care and superintendence of the public buildings, and the care, custody, and management of all the property of the city, with power to lease or sell the same, except the Common and Faneuil Hall.” Charter, Sec. 39) and to prevent possible disturbance of the peace, then, *a fortiori*, the State

may, by law, establish its control, supervision, censorship of preachers and preaching over all places owned or controlled by it; and Congress may do in like manner in the District of Columbia, and in the territories, and in all places under its control. All of this being declared valid by our courts, the sect, or combination of sects that should be able to secure a majority, might determine all questions relating to the worship of God and the preaching of the gospel in all of those places in their discretion and by their power of "permit." And when the land shall all be "nationalized," and the State — the nation — hold it all as public property, granting occupation only on such terms, conditions, and restrictions as it may choose, it will be difficult for men to worship God, not only in public, but in private, save as by law they may be directed, or permitted.

Then think how the heathen rulers, to whose subjects we have sent missionaries, might have saved their public peace from disturbance, and prevented missionary work by a measure like this; and how vexed they must be that they did not think of this before. And, even now, India, Africa, China, and the "islands of the sea," may conclude to profit by this Boston example,—if held valid—in which case loud appeals may be made by our great missionary and Bible societies, asking the President to interfere with the power of the United States, to prevent the outrage threatened by those heathen who have learned of the "law" which is enforced in Boston.

### III.

This ordinance—Sec. 11, ch. 37, Revised Ordinances—is not reasonable. It is not necessary as a regulation to preserve the peace or to prevent possible disturbance of the peace, but it is calculated to provoke and cause breaches of the peace, if enforced, or attempted to be enforced.

It never has been enforced, and it never will be enforced, while the spirit of liberty prevails or is breathed in Boston. Something must still be pardoned to the spirit of liberty.

An ordinance which the best class of our citizens, the most peace-loving and law-abiding, cannot conscientiously obey ; an ordinance which, when enforced, or undertaken to be enforced, it becomes a sacred duty to violate, and suffer imprisonment, and death, if need be, rather than yield obedience to it,—is not a reasonable ordinance.

An ordinance which gives direct encouragement to the irreligious, and to the disorderly disposed, and to those who object to the free public reading of the Bible and worship of God, to create disturbance of such reading and worship, and to regard and treat the ministers of Christ who publicly and freely preach to the people as violators of the laws, and their teaching as wrong and injurious, and opposed to the best interests of the city and of the State,—is not a reasonable ordinance. If it is not right—not good or fit—that the masses of the people shall hear such reading and preaching out of doors, in public places, on the Common, then it may well be said, and many people may be taught, that such reading and preaching are not good and fit to be heard anywhere, not even in our churches : an ordinance which may lead to this result is not a reasonable ordinance.

An ordinance which demands of the servant of the Most High God, that before he shall proceed to freely and publicly deliver his message to the people of Boston, he must go to the City Hall and humbly ask and petition a committee of the City Council for a “permit,” and submit to that committee the determination of the question of his “call” or commission, and also the questions of fitness, expediency, time, place, character, and quality of preaching, and all the conditions under which the sacred message may be delivered, whether that committee *chance* to be a “reasonable committee” or an unreasonable committee,—is not a reasonable or-

dinance. An ordinance which depends so entirely upon the uncertain and questionable character of a joint committee of the City Council of Boston, at the present time and prospectively, is not "reasonable."

An ordinance which flies in the face of all American ideas, and undertakes to set up and establish here a theory and system of government wholly at war with the principles for which our fathers imperiled their lives, their fortunes, and their sacred honor, as this ordinance does,— cannot be called a reasonable ordinance. The people of Boston are not quite ready to accept and abide by the "paternal" idea of the absolute monarchs of Europe. They still prefer a little more liberty than that idea allows, even though the "order" shall be less stringently enforced. The laws of this State are all-sufficient to enable any city or town within it to secure peace and good order, and without subverting or encroaching on the ancient rights and liberties of the people. The foundation of all our laws must be found in equal rights, equal privileges, and equal duties for all men; and this American idea and principle cannot be set aside by an ordinance of the City of Boston,— an unequal and unrighteous ordinance.

The *right* to preach on the Common is admitted; and the attempt of the City Council now is to "regulate" it,— to say who may and who may not exercise that right; but if the right pertains to any person, then *it pertains equally to all persons*. The statement that the committee "would not license everybody: they would not license forty or fifty men to do it on the same day," instead of being a reason in support of this ordinance, is an all-sufficient argument against it, as it admits the *violation of equality of right*.

This ordinance does not prohibit *all* preaching on the Common, treating all persons, sects, creeds, beliefs and unbeliefs alike. It does not proceed on the ground that the time has come, when, owing to the great and increasing diversity of religious faith, and lack of religious faith, it is

expedient and needful for the public peace and good order that no preaching shall be allowed on the Common and other public places. The claim is not now made that the people of our City are divided into diverse and conflicting sects,—Protestant and Catholic—and besides these, Free-thinkers, Free-lovers, philosophers, pantheists, pagans, Spiritualists, Scientists (falsely so called), Swedenborgians, Unitarians, infidels, atheists, and Jews, together with disciples of Gautama and Confucius,—the last two constituting the latest religious renaissance—and therefore free, public, Protestant preaching in public places should be no longer continued, or countenanced by State and Municipal authorities, and consequently, all expressions of these faiths, opinions, fancies, negations, and notions should be, each and all, equally discountenanced by the public authorities, and relegated to their respective private chapels, churches, temples, halls, and groves, and excluded from all public places.

#### IV.

If the ordinance under which these complaints were made is “the same in effect as those of previously existing ordinances,” and “shall be construed as continuations of those ordinances,” viz: the ordinance of Feb. 1870, and the ordinance of Jan. 4, 1862,—which last-named was the first ordinance passed by the City Council of Boston relating to the Common and other public grounds—then said ordinance, sect. 11, chap. 37, of the Revised Ordinances of the City of Boston, when these complaints were made, was obsolete, and of no effect.

The ordinance of Jan. 4, 1862, was in the following words:—

“Sec. 11. No person shall deliver any sermon, lecture, address, or discourse on the Common, Public Garden, pub-

lic squares, or common lands of the city, without the permission of the mayor and aldermen."

The ordinance of Feb. 28, 1870, was as follows:—

"It shall be the duty of any police officer to remove from the Common, Public Garden, or any of the public squares or common lands, any person who is violating any law or ordinance, or is guilty of disorderly conduct."

But it was not proved that this ordinance was in the Revised Ordinances,—and it is not there.

This is the ordinance under which these complaints are brought:—

"No person shall, except by the permission of the said committee, deliver a sermon, lecture, address, or discourse on the Common, or other public grounds."

Rev. Ord., ch. 37, sec. 11.

A statute may become, and may be declared to be, obsolete, when the object to which it was intended to apply, or the occasion for which it was enacted, no longer exists; and also, it is submitted, when there was no occasion for its enactment, and it has remained a dead letter and disused for more than twenty years.

Ordinances of the City of Boston may and do become obsolete; and ordinances have been declared obsolete by the City Council.

In the Revised Ordinances of the City of Boston, pp. 177 to 188 inclusive, there appear nine ordinances "Dropped as obsolete," and thirteen ordinances "Omitted as obsolete," all of which were contained in the volume of "Statutes and Ordinances" which was compiled in 1876; and an examination shows that, of these, there were ordinances which were originally passed as late as 1871 and 1872. On p. 185, Rev. Ord., Sects. 1-7, pp. 955-958, S. and O., one is "Omitted as beyond power of City Council."



The courts of this Commonwealth certainly have at least equal power with the City Council to declare an ordinance obsolete.

That the City Council may repeal an ordinance there can be no doubt; but its power to declare an ordinance "dropped as obsolete," or "omitted as obsolete," or even "omitted as beyond power of City Council," might, if there was occasion, be questioned; but there can be no question of the power and of the duty of the courts of this State to decide as to the legal existence and validity of the ordinances of the City of Boston when required to do so.

And it is submitted that, on the proof of the facts which the defendant offered to prove in this case, it was the duty of the court to find and rule that this ordinance was obsolete.

## V.

The evidence offered by the defendant and excluded by the court should have been admitted.

1st. It was competent to prove facts which would require the court to rule on the question of whether or not the ordinance under which these complaints were made was obsolete, and which would warrant the court in finding and ruling that said ordinance was obsolete.

From the time when this ordinance was made by the City Council to the time of these complaints, every administration of the City Government recognized that this ordinance would be more "honored in the breach than in the observance" of it, and instead of enforcing it, "dropped" it, and treated it as a nullity; it was "disused," obsolete; it cannot properly be said to have "gone out of use," for it was never used; it was disused, disregarded, violated under police protection,—it was obsolete.

The question whether said ordinance was obsolete was a question of law, to be determined by the court after having

heard the testimony and found the facts. And on the proof of the facts which the defendant offered to show, and which the court ruled immaterial and incompetent, the court should have ruled that the ordinance was obsolete.

2nd. It was also competent for the defendant to prove that he was not guilty of any breach of the peace.

Although there was no allegation of any breach of the peace in the complaint, the defendant could not be convicted without proof that he disturbed the peace; and it might be claimed by the Attorney for the government, that the fact of preaching on the Common without a permit—violating the law—would warrant the jury in finding that the defendant committed a breach of the peace; and, as no objection to the complaint was made by the defendant, he had the right to meet that claim and argument by this proof.

## VI.

Each and all of the defendant's requests for rulings and instructions ought to have been given, and the jury should have been instructed to return a verdict of not guilty, and not a verdict of guilty.

No instructions or rulings not excepted to were given by the court. There was no contention respecting the fact that the defendant preached on the Common at the times stated in the said complaints, and the defendant admitted that he did so without any permit, and his defense rested entirely on the questions of law now presented to this court.

## VII.

The right to preach the gospel is not derived from the State; the church is not the creature of the State; and the State has no right to limit or restrain the pub-

lic free promulgation of the Word of God and the gospel of Jesus Christ.

The authority, duty, and right to preach the gospel, come from God alone. To him called of God, it is a command; and the command is, to "go into all the world and preach the gospel to every creature." No government on earth has authority to prevent or restrain the exercise of this right.

The attempts to do this by the governments of the world have caused the shedding of much blood, the making of many martyrs, and the destruction of many dynasties; and no government can take any step more certain to lead to its downfall than this. The true servant of God never yields this right but with his life. "Render unto God the things that are God's," is quite as important to be remembered as "Render unto Cæsar the things that are Cæsar's." There are things in this world which do not belong to Cæsar, and which do belong to God, and the right here contended for is one of those things.

The last words spoken on earth by Christ to his disciples, as recorded by Matthew, were these: "*All authority hath been given unto me in heaven and on earth. Go ye therefore and make disciples of all the nations . . .*"

To "go into all the world and preach the gospel to every creature," and to "*make disciples of all the nations,*" involves the right to use all the means necessary to that end, the first and most important of which is, to find and approach the people,—to go where the people may be found, in the public places—the places of resort where the common people can be found.

From the time when Christ began preaching in Judea, to Paul preaching in the market-place and on Mars Hill at Athens, to Whitefield and Wesley on Kennington Common,

and Jesse Lee on Boston Common, and to the arrest of the defendant, Horace L. Hastings, and Dr. Gordon for preaching on Boston Common, this right has been claimed and exercised by the ministers of Jesus Christ, and it cannot be surrendered now.

From the time when Jonah preached in the streets of Nineveh, Elijah on Mount Carmel, Nehemiah in the streets of Jerusalem, and John the Baptist on the banks of Jordan, the message of God to man has been proclaimed in the public places.

It has been said in this case, and it may be repeated here, that "If the city of Boston has a right to pass that ordinance, then the first duty of every citizen, and of every Christian citizen in particular, is to obey the government; that is the highest duty of Christian citizenship, if the government has a right to pass the law, to obey the government, and not to set up a government within the government." The converse of this is, if the City of Boston has *no* right to pass that ordinance, then the first duty of every citizen, and of every Christian citizen particularly, is to *disobey* the government. Martyrs, not *subservients* to civil laws which contravened the commands of God and the inalienable rights of man, created the Christian religion, and have maintained it in the world: \* and *martyrs are always law-breakers*.\*

Civil laws made to secure peace and good order by controlling and regulating the consciences of men respecting religion and morality, have been the most prolific means of causing the evils which it was hoped they would avert: and it is time that the men who set up to "rule" the world learn something from this.

From Christ to John Brown, the history is the same.

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\* I should amend this clause as follows: Martyrs, or witnesses to the truth, always disobey *unlawful* ordinances. Acts 4: 18-20; 1 Cor. 2: 7-16. W. F. D.

Conscience, oppressed by law, breaks the law and overthrows it, uprooting and destroying the "order" which the law was made to preserve.

"If the city of Boston has a right to pass that ordinance," then it must be grounded on the same false plea of the necessities of government and the maintenance of public peace and order that was formerly used to justify the banishment of Roger Williams, the nailing up of the doors of the first Baptist church in Boston, the expulsion of Jesuits and Roman Catholic priests, the public whipping of men and women, and the hanging of Quakers on the Common.

A learned lawyer, James Fitzjames Stephen, Q.C., who has written in justification of the action of Pontius Pilate, says:—"No one in these days will deny that, taking the only view which it is fitting to take here, the purely human view of the subject, Christ and his disciples were right in preaching their religion at all risks. Apart from its supernatural claims, its history is their justification: no rational man can doubt that Christianity, taken as a whole and speaking broadly, has been a blessing to men. From it, not all, but most of the things which we value most highly have been derived." (*Liberty, Equality, Fraternity*, p. 89.)

"The work which positive provisions have to do, is not so great as it was once thought to be. Not quite everything in society is dependent on civil law. There are natural forces, inherent motives, which take adequate care of very many interests. It is not surprising that before these natural laws—this legislation of God—was well understood, it should have been frequently overlapped and set aside by human enactments. It is only surprising that legislators should so long and so obstinately continue to thrust their positive enactments in the teeth of natural law, to the vexation and discomfiture of the very interests they strive to

protect." (Prof. John Bascom, *American Presbyterian Review*, Jan. 1871.)

From Debates in Mass. Convention of 1820, on the Declaration of Rights, Art. III., I quote the following :—

Mr. Nelson, p. 352. "When any one makes up his mind that it is his duty to worship his Creator, he decides also on the manner in which it is proper to worship him. He cannot delegate the doing of this to a legislature."

Mr. Childs, p. 358. "The right of every individual to worship God in a manner agreeable to his own conscience, was one which no government could interfere with."

Mr. Abbot, p. 362. "There were some rights, such as that of private opinion, when it does not result in acts hostile to the well-being of the community, where the legislature ought not to interfere."

Mr. Nelson, p. 363. "Religion was not a matter for legislation."

Mr. Wilde, p. 373. "Morality cannot exist without religion. . . . Morality has no *sanctions*, and can be *no check*. Take away religion, and you take away all restraints on the passions, on vice, on immorality. Not all the standing armies on earth could support a government without the restraints of religion; armies themselves could not exist without it. Nothing was so contrary to the experience of mankind as that morality could be supported without religion. . . . The framers of the Constitution have guarded all points. They were sensible that *the people have no right* to restrain a man in the *exercise* of the *rights* of conscience."

Mr. Dean, p. 383. "If Christianity had done nothing more than to teach man that they had *equal rights*, it would be entitled to everlasting veneration. . . . Civil governors do not know what belongs to the Christian religion, and are therefore incapable of bestowing rewards and imposing re-

straints in regard to it. . . . When our religion had its greatest power and spread with the greatest velocity, it was not owing to miracles or to force, but to *argument*."

Mr. Holmes, p. 384. "It was a principle that had been repeatedly recognized by gentlemen on both sides, that the duty of religious worship is an affair that civil government has nothing to do with, and lies exclusively between God and the soul. That it was an indefeasible right of every one to worship God according to the dictates of his own conscience, was universally conceded. . . . 'Worship the Lord thy God, and him only shalt thou serve.' This was pronounced under the severest penalties. The decalogue enjoined two classes of duties, those to our Maker, and those to our neighbor. The first of these did not come within the powers of the Legislature."

Mr. Saltonstall, p. 386. "The Christian religion is the great bond of civil society. . . . Religion extends to the heart—human laws concern actions alone. . . . Massachusetts is a religious Commonwealth. But for the devotion of our fathers to religion, the spot where we are assembled might still have been a wilderness. . . . Their first care was the support of public worship. . . . The question may now be whether a great moral revolution shall take place in the Commonwealth."

Mr. Savage, p. 392. "It was not until 1645, twenty-five years after the settlement of the country, that town schools were established, even in the largest towns. The common schools are the children of religion, and religion not the child of town schools. He hoped that the children would never succeed to destroy their mother."

Mr. L. Lincoln of Worcester. "He was in favor of supporting religion, and as the father of a family, if he were reduced to the alternative, he would prefer that his children should have the moral and religious instruction of Sunday, rather than the literary instruction of the other six days of

the week. Man was a religious animal, and would fix upon one object or another for his adoration."

Mr. Blake, p. 421. "He was unwilling to leave anything on the subject of conscience and religious freedom to the legislature."

Mr. Blake, p. 437. "It is nevertheless admitted that even a majority of the people, in the very plenitude of their sovereignty, have not the right to establish a rule of government which would interfere with the rights of conscience or any other rights which can be classed among the inalienable rights of the citizen."

Mr. Webster, pp. 443-449. "The French had a maxim in eloquence, that *nothing was beautiful that was not true*. The effect of every sect was good when we look to the interests of society. He considered it (religion) the only security of the good order of society, as the basis of the moral character of the community, as the only protection of a free government. The question was, whether we should take measures through the power which it was declared the government ought to possess, to disseminate this religion, or leave it to the will of every individual."

St. Paul disputed in the synagogue with the Jews and with the devout persons, and in the market daily with them that met with him (Acts 17: 16, 17); but "His most efficient work was accomplished when he turned his back upon the synagogue and the proselytes, and went down daily into the market-place. . . . The market-place of Athens was at once its exchange, its lyceum, and its lounge; . . . the chosen field of his efforts is not the precincts of the court, but the *meeting-place* and the conscience of the common people. He did not wait for the people to come to him, he went to them; and those to whom he went were not the rulers, the leaders, the authorities of the hour, but rather those whose only influence was the influence of personal character. . . . In the history of that new religion of which the apostle was the



messenger, it was always so. . . . The new religion aimed to testify to its sympathy with the masses. It was not meant for the few, but for the many. It was not aristocratic, it was democratic. Its founder was not one of the 'privileged classes,' he was a mechanic. Its message was not to self-complacency, but to conscious sorrow, want, and need. And so it turned away from courts, and palaces, and royalty, and went where sorrow, and want, and need were most surely to be found. . . . The new religion turned its footsteps to the market-place, because, with a divine intuition, it discerned that in the renewal and ennoblement and transformation of the passions and ambitions, the hopes and interests of the market-place, was to be found the redemption of humanity. . . . Without seeking merely to initiate reforms in the council chamber, we must begin by proclaiming the mind and will of God to men in the market-place.

. . . And when Sunday comes, what is to become of the man or woman who can neither own or hire a pew, and whose bearing and attire too often make them strange and ill at ease in too many of our congregations? . . . At best, a municipal discipline, however admirable, can only repress and punish the outward manifestation of our social evils. The medicine that shall heal them must be drawn from that divine fountain which was opened when the Son of man hung dying upon the cross of Calvary." (Henry C. Potter, D.D., *Sermons of the City*, pp. 1-7, 77, 322.)

Can the City of Boston be permitted by this court to be less tolerant of public Christian preaching than pagan Rome was in the early part of the third century?

A case quite like this was brought by appeal before the Emperor Alexander Severus, as this case is brought before your Honors for decision. A piece of common land had been occupied by the Christians—for public preaching, of course—and on it they had erected a church, probably the first Christian church built at Rome. This ground was

claimed by a tavern-keeper—or, as Crevier says, by vintners—the rumsellers of their day. The Emperor, a pagan, decided the case in favor of the Christians, the defendants; saying: “It is better that God should be served there, in any manner whatever, rather than a tavern should be made of it. (See Goodrich’s *Church History*, p. 52.)

Dr. Lardner, vol. 7, p. 332, respecting this, quotes Lampridius thus:—“When the Christians had seized a spot of ground which was public, and on the other hand the victualers said it ought to be granted to them, he gave this rescript,—That it was better that God should be worshipped there in any manner, than that the ground should be granted to the vituallers.”

That the City Council of Boston would decide as wisely between similar rival claimants for the Common, or for the use of it, may well be doubted.

This ordinance is now used, and its enforcement insisted on for the first time, to secure from the defendant his acknowledgment of the power and authority of the City Council and its committee, over him, in this matter; and he is asked to accept the “privilege” of preaching at the hands of this committee, who are now ready and anxious, as he has been assured, to grant him their “permit,” on the simple condition that he will acknowledge their power and authority, and ask—petition—for it: and a newspaper of our city has not hesitated to declare the defendant beyond the pale of public sympathy for his “neglect to comply with this simple condition,” which “made them”—the defendant and Mr. Hastings—“violators of law,” and “set an example of contempt of authority.”

Satan sought from our Lord a “simple condition” in recognition of his right, power, and authority, for which Satan offered him all the kingdoms of this world; and in that case our Saviour “set an example of contempt for *authority*” falsely asserted.

Both Satan and the City Government of Boston have claimed the right to offer, and have temptingly offered, things which were not theirs, and which they had no right, power, or authority to give or take away.

“Whenever legislation renders the possession or enjoyment of property precarious, whenever it cuts down the obligation and security of contracts, whenever it breaks in upon personal liberty, or compels a surrender of personal privileges, upon any pretext, plausible or otherwise, it matters little whether it be the act of the many or the few, of the solitary despot or the assembled multitude,—it is still in its essence tyranny. It matters still less what are the causes of the change; whether urged on by a spirit of innovation, or popular delusion, or State necessity (as it is falsely called), it is still power, irresponsible power against right; and the more to be dreaded when it has the sanction of numbers, because it is then less capable of being resisted or evaded. Unfortunately, at such times the majority prevail by mere numbers, and not by force of judgment. (*Numerantur, non ponderantur.*) . . . One of the beautiful boasts of our municipal independence is, that Christianity is part of the common law, from which it seeks the sanction of its rights, and by which it endeavors to regulate its doctrines. . . . There has never been a period in which the common law did not recognize Christianity as lying at its foundations.” (Judge Story, in *Inaugural Discourse* as Dane Professor of Law in Harvard University.)

“The government of a nation, the greatest trusteeship in the world, is bound by solemnities of office and of oath to the God of nations. And he who, invested with such a function, has not arrived at this view of it, has yet to learn what are the first principles of the doctrine of government.” (Orville Dewey, D.D.)

“Give me the liberty to know, to utter, and to argue

freely according to conscience, above all liberties." (John Milton, *Speech for the Liberty of Unlicensed Printing.*)

"It will not therefore misbecome the meanest Christian to put in mind Christian magistrates, and so much the more freely by how much the more they desire to be thought Christian (for they will be thereby, as they ought to be in these things, the more our brethren, and the less our lords), that they meddle not rashly with Christian liberty, the birth-right and outward testimony of our adoption; lest while they little think it, nay, think they do God service, they themselves, like the sons of that bondwoman, be found persecuting them who are freeborn of the Spirit, and by a sacrilege of not the least aggravation, bereaving them of that sacred liberty which our Saviour with his own blood purchased for them." (John Milton, *Civil Power in Ecclesiastical Causes.*)

The rights of conscience and liberty of thought are not merely the right of *thinking*, the right of *private opinion*; these are *beyond the reach of law*. But the rights of conscience and the liberty of thought, are the right freely and publicly to *exercise* the rights of conscience and the liberty of thought; the right to *act* as well as think; the right to *reach and influence other persons*. And this right further, of necessity, involves the right to do this *in all public places*. But, as all human rights are relative and none are absolute, this must always be exercised in such a manner as not of *itself* to disturb the public peace, or obstruct others in the exercise of their rights; and beyond this no human law may go. This condition, this regulation, this *principle*, with us is *fundamental law*, recognized and declared in — not created by — the Constitution of our State, and it is beyond the action of City Councils, or the action of the Legislature; *it is beyond the rightful reach of any human power*.

JAMES F. PICKERING,  
*Attorney for William F. Davis.*

[4.]

DECISION OF THE SUPREME COURT OF  
MASSACHUSETTS.

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COMMONWEALTH OF MASSACHUSETTS,

*vs.*

WILLIAM F. DAVIS.

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1. The ordinance of the City of Boston, providing that no person shall, except by permission of the city-government committee, deliver a sermon, lecture, address or discourse on the Common or other public grounds, is valid.
2. The statutory provision requiring by-laws of towns to be recorded in the office of the Clerk of the Superior Court, has no application to the ordinances of the City of Boston.
4. The ordinance in question is not rendered invalid by the fact that it was not published.

(Decided January 8, 1886.)

ON defendant's exceptions taken at a trial in the Superior Court for Suffolk County, of two criminal complaints appealed from the Municipal Court of the City of Boston. Exceptions overruled.

The defendant was charged with having, on May 17 and May 24, 1885, delivered a sermon, lecture, address and discourse on Boston Common, without permit, and in violation of § 11, ch. 37, Revised Ordinances of the

City of Boston. The trial resulted in a verdict of guilty.

Mr. James F. Pickering, for defendant.

These complaints were made under the following ordinance: "No person shall, except by the permission of the said committee, deliver a sermon, lecture, address, or discourse on the Common, or other public grounds." Rev. Ord., ch. 37, § 11.

The police authorities and officers of the City of Boston, in the exercise of the powers, and performance of the duties, imposed by the laws of the State, act as public officers, and not as officers of the City. *Buttrick vs. Lowell*, 1 Allen, 172; *Walcott vs. Swampscott*, 1 Allen, 101; *Hafford vs. New Bedford*, 16 Gray, 297; *Barney vs. Lowell*, 98 Mass., 570; *Brimmer vs. Boston*, 102 Mass., 19; *Fisher vs. Boston*, 104 Mass., 87; *Hill vs. Boston*, 122 Mass., 344; *Cushing vs. Bedford*, 125 Mass., 526; *Lemon vs. Newton*, 134 Mass., 476; *McCarthy vs. Boston*, 135 Mass., 197.

"Whoever willfully interrupts or disturbs an assembly of people met for the worship of God, shall be punished by imprisonment in the jail not exceeding thirty days, or by fine not exceeding \$50." Pub. Stat., ch. 207, § 21.

"It is the right as well as the duty of men in society, publicly and at stated seasons, to worship the Supreme Being, the great Creator and preserver of the universe. And no subject shall be hurt, molested or restrained in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or

sentiments; *provided*, he doth not disturb the public peace, or obstruct others in their religious worship." Const. Mass., Bill of Rights, art 2.

"If any worship was necessary to the good order and happiness of a community, it must be public worship. The worship of the cell and the cloister had nothing to do with society." Debates in Mass. Convention of 1820, 349.

"It is not lawful for any State in this Union to make any law which may restrain the free expression of religious belief, or the free exercise of religion and religious worship, according to the dictates of the conscience." Cooley, Const. Lim., 469.

Mr. Edgar J. Sherman, Atty-Gen. for the Commonwealth.

Every city and town duly established has the right and duty to make by-laws and ordinances for the proper protection of the property of the town or city, and for the rights of inhabitants thereof; it is an inherent right to their existence. Dill. Mun. Corp., 2d ed. § 250.

While the court has unquestionably the power to deny effect to an unreasonable by-law or ordinance, "It is, however," in the language of Dewey, *J.*, in *Commonwealth vs. Robertson*, 5 Cush., 442, "a power to be cautiously exercised."

The ordinance under which the defendant was convicted has never been repealed, set aside, annulled, or abandoned, and it is not obsolete. An ordinance cannot become obsolete; it remains in force until repealed. Dill. Mun. Corp., 2d ed. § 249.

By ch. 27, § 21, Pub. Stat., it is provided that:

“ Before any by-law takes effect it shall be approved by the Superior Court, or in vacation, by a justice thereof, and shall with such approval be entered and recorded in the office of the clerk of the courts in the county where the town is situated.”

So much of this section as relates to the approval of the court was originally passed in 1785, ch. 75, § 7, and is to be found, in substance, in all revisions of the general laws of the Commonwealth.

The portion of the section relating to the recording of the ordinances and by-laws was originally passed in 1855, ch. 222, § 2. Section 1 of said chapter provides, that: “ In all cases in which it is necessary to procure the approval of the court of common pleas of an ordinance” the approval of a single justice is sufficient; and section 2, aforesaid, provides, that: “ Before such ordinance or by-law shall take effect it shall be recorded,” as in § 21, ch. 27, Pub. Stat.

Now the charter of the City of Boston, under the authority of which the ordinance was passed, under which ordinance the complaint in this case was made, was originally passed in April 1854, ch. 448, Acts of that year. Section 35 provides, that “ All the powers heretofore by law vested in the Town of Boston, shall be vested in the mayor, aldermen, and common council of the said city.”

The last clause, providing that no sanction of any court or other authority is necessary to the validity of an ordinance passed by the Common Council, being inconsistent and repugnant to the provision requiring such approval, passed in 1785, and found in the R. S., ch. 15, § 13, 1836, is in accordance with the decisions in



Goddard *vs.* Boston, 20 Pick., 410, and City of Somerville *vs.* Boston, 120 Mass., 575, and, so far as the Ordinances of the City of Boston are concerned, a repeal of said provision.

And the statute requiring it to be recorded was passed subsequently, 1855, ch. 222, § 2, to the passage of the Act of the charter of the City of Boston, 1854, ch. 448, in which no approval or authority was necessary to the validity of its ordinances, and, hence, upon the face, would be, in its turn, a repeal of said provision just referred to.

The provisions in ch. 27, Pub. Stat., are inapplicable to the Ordinances of the City of Boston, because of the provisions of its charter. See *Commonwealth vs. Brooks*, 109 Mass., 355.

Again : the ordinance was not published, as is required by Pub. Stat., ch. 27, § 23. This, however, is not necessary. The provision of the charter of the City of Boston, passed subsequently, as shown above, to the passage of this statute, nullifies its effect so far as applicable to the City of Boston.

This is true, although in § 2, ch. 1, Rev. Ord., 1883, it is provided that : "All ordinances shall be recorded, . . . and, except when otherwise provided, shall be published." This provision is not a condition precedent to the validity of an ordinance ; it is nowhere said that the ordinance shall not take effect, unless or until recorded and published.

Section 11, ch. 27,\* under which the complaint was found, is exactly the same in effect as § 14 of that

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\* It is chapter 37, not 27.

passed in 1870,† which was shown to have been published, and hence, being the same in effect, is but a continuation of said ordinance of 1870, and should be so construed. Therefore, § 11, ch. 27, being a continuation of, and the same in effect, as the ordinance of 1870, it is, in law, that ordinance, and it, as has been shown, was duly published. The defendant's fifth request, as well as the others, was properly overruled.

Morton, Ch. J., delivered the opinion of the court.

By the city charter of Boston, the city of government has "The power to make all such needful and salutary by-laws or ordinances, not inconsistent with the laws of this Commonwealth, as towns by the laws of this Commonwealth have power to make and establish, and to annex penalties not exceeding \$50 for the breach thereof; which by-laws and ordinances will take effect and be in force from and after the time therein respectively limited, without the sanction or confirmation of any court, or other authority whatsoever." Stat. 1854, ch. 118, § 35.

In pursuance of this power, the city-government committee framed the ordinance under which these complaints were brought, which is as follows: "No person shall, except by permission of the said committee, deliver a sermon, lecture, address or discourse on the Common, or other public grounds." Rev. Ord., ch. 37, § 11.

This ordinance is not inconsistent with any law of the Commonwealth, and we see no ground for holding it to

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† No ordinance of this sort was passed in 1870, see City Clerk's letter, *Appendix*, No. 6.

be unreasonable and invalid. Its purpose is to promote the public peace, and to protect the public grounds from injury, and it is calculated to effect these ends without violating the just rights of any citizen.

The defendant's claim, that this ordinance has become obsolete, because the same or similar ordinance enacted in 1862 has not been enforced, and has been repeatedly violated, cannot be sustained. A statute or ordinance remains in force until it is repealed. The ordinance under which the defendant was convicted was enacted in 1882, and the evidence offered to show that the ordinance of 1862 had been disregarded or disused was immaterial, and rightly rejected.

The defendant contends that this ordinance is invalid. because it has not been recorded in the office of the Clerk of the Superior Court for the County of Suffolk, under Pub. Stat., ch. 27, § 21.

But this provision requiring a record in the clerk's office, applies only to the by-laws of the towns which are required to be approved by the Superior Court, or a justice thereof. The provisions of the twenty-seventh chapter of the Public Statutes apply to cities only, "So far as they are not inconsistent with the general or special provisions relating thereto," Pub. Stat., ch. 28, § 2.

As we have before seen, the thirty-fifth section of the charter of Boston provides that the ordinance shall take effect and be in force from and after the time therein respectively limited, without the sanction or confirmation of any court, or other authority whatsoever.

The provisions of the twenty-fifth section of chapter 27 are inconsistent with this special provision, and,

therefore, that section has no application to the ordinances of the City of Boston.

The defendant also contends that this ordinance is invalid because it has not been "published two weeks consecutively in three daily newspapers published in the city," as required by the ordinances. There are two answers to this claim.

The revised ordinances require such publication, but there is no provision that the ordinances shall not take effect until such publication; the provision requiring publication is directory; it contemplates a publication after the ordinance is enacted, and a compliance with it is not a condition to the validity of the ordinance. But if this were otherwise, it appears that the ordinance under which the defendant was convicted is a *résumé* or continuation of an ordinance in the same terms passed in 1870, and which was duly published. The revised ordinances provide that "So far as their provisions are the same in effect as those of previously existing ordinances, they shall be considered as continuations of these ordinances." Rev. Ord., ch. 1, § 3.

It would seem that the ordinance would not require a new publication of those old ordinances, which are merely compiled and contained in the revised ordinances. It follows that none of the exceptions taken at the trial can be sustained.

Exceptions overruled.

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\* No such ordinance was passed in 1870.

[5.]

## SUPREME COURT OF MICHIGAN.

OCTOBER 28, 1886.

## FRAZEE'S CASE.

Municipal Corporations — Police Regulations — Street Parades — Constitutionality of Ordinance.

A city ordinance providing that "no person or persons, associations or organizations, shall march, parade, ride, or drive in or upon or through the public streets of the city of Grand Rapids, with musical instruments, banners, flags, torches, flambeaux, or while singing or shouting, without having first obtained the consent of the mayor or common council of said city,"— is unreasonable and invalid because it suppresses what is, in general, perfectly lawful, and leaves the power of permitting or restraining processions to an unregulated official discretion."\*

Writ of *habeas corpus* to determine the legality of the detention of Andrew Frazee, under a complaint and warrant in a proceeding in the police court of Grand Rapids.

Campbell, C. J. Petitioner was brought up on *habeas corpus* to determine on the legality of his detention under a complaint and warrant in a proceeding

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\*See *State vs. White* (N.H.) 5 Atl. Rep. 848.

before the police court of Grand Rapids. No point is raised concerning the formality or jurisdiction of the court, if the by-law is valid under which the complaint was made. We shall therefore not pass upon the form of the remedy, as no argument was made except on the by-law.

The complaint was made under a by-law of the city of Grand Rapids, passed on the thirteenth of September, 1886, and which, from the petition, appears to have been published on the twenty-fourth of the same month. The violation of it is alleged to have occurred on the twenty-eighth of September, which seems to have been as soon as it became operative. The by-law in question is entitled, "An ordinance to regulate the use of the public streets in the city of Grand Rapids, and to prohibit certain doings therein." This ordinance consists of five sections, of which the first and fifth are chiefly material in this inquiry.

The first section is as follows: "No person or persons, association or organizations, shall march, parade, ride, or drive, in, or upon, or through the public streets of the city of Grand Rapids, with musical instruments, banners, flags, torches, flambeaux, or while singing or shouting, without having first obtained the consent of the mayor or common council of said city; funeral and military processions, however, shall not be subject to the foregoing provisions of this section; but such processions, as well as those having the permit or consent of the mayor or common council, when using the public streets of said city, shall conform to such directions as the mayor or chief of police may give in relation to the streets to be used, and the portion thereof to be occu-

pied by them, and in relation to the manner of such use." (Then follows a clause that nothing in this ordinance shall affect or impair existing ordinances on nuisances, and the use of streets and sidewalks.)

Section 2 prohibits breaking up or interfering with funeral processions. Sections 3 and 4 relate to circulating advertising devices.

Section 5 is as follows: "All persons who shall violate any of the provisions of this ordinance, on conviction thereof, shall be punished by a fine of not exceeding five hundred dollars, and costs of prosecution; and, in default of the payment thereof, shall be imprisoned in the common jail in the County of Kent, or in any penitentiary, jail, or work-house of said city, at hard labor, until the payment of such fine and costs, but for a period not exceeding ninety days.

The nature of this imprisonment seems to correspond with criminal, rather than with civil imprisonment; but, as this question was not fully argued, it will not be especially noticed on the present hearing, as the other questions raised are decisive.

The petition for the writ of *habeas corpus* sets out that petitioner and his associates are members of an organization known as the "Salvation Army," which had paraded in Grand Rapids during two years and more, and, on repeated prosecutions for public nuisance, had been acquitted, and that the ordinance in question had followed quite soon after the last acquittal. Various considerations are set up concerning the rights of such bodies which do not become very material, as the case stands on the record.

On the twenty-ninth day of September, 1886, peti-

tioner and several others were arrested for having violated the ordinance on the previous evening. The charge made was that they "did then and there parade, in, upon, and through the public streets of the city of Grand Rapids, to-wit, Canal street and Pearl street, with musical instruments, banners, and flags, while singing and shouting, without first having obtained the consent of the mayor or common council of the city of Grand Rapids," contrary to the ordinance before named. Under the warrant petitioner was arrested, and has since been kept in custody, the trial having been postponed to enable this application to be made.

The validity of sections 1 and 5 of the ordinance is disputed on various grounds,—the former, as an unreasonable and unlawful interference with the streets; and the latter, as unauthorized and oppressive, beyond the power of the city to enforce.

Section 1, as has been seen, while imposing no limits on military or funeral processions, except that it authorizes the mayor or chief of police to confine them to particular streets, gives to those officers unlimited discretion in fixing their route. Other processions cannot move at all, with music and banners, unless authorized by the mayor or council; and, when so authorized, are under the same arbitrary direction, as to route, of the mayor or chief. Funeral processions, and no others, are protected from disturbance.

As the common council only sits at intervals, the power of determining whether processions shall be allowed is left practically within the unlimited discretion of the mayor. Some of the questions argued before us concerning the fifth section, had some bearing



on the constitutionality of portions of the charter, as well as by-laws. So far as Section 1 is concerned, it is claimed to be outside of any inference or grant of authority in the charter. That point may be first noticed.

There is no express reference in the charter to the use of streets for processions, and no power is given to license or regulate them, in terms. It contains no reference to the streets, beyond such as contemplates that they shall be under municipal oversight in the usual ways, some of which are mentioned. Counsel for the city referred to various powers which they claim cover the ordinance in question. These were the powers "to prevent vice and immorality; to preserve public peace and good order; to prevent and quell riots, disturbances, and disorderly assemblages;" "to prevent the cumbering of streets, sidewalks, etc., in any manner whatever;" "to control, prescribe, and regulate the manner in which the highways, streets, avenues, lanes, alleys, public grounds, and spaces within said city shall be used;" "to prohibit practices, amusements, and doings in said streets, having a tendency to frighten teams and horses, or dangerous to life and property;" "to prohibit and prevent any riot, rout, disorderly noise, disturbance, or assemblage in the streets or elsewhere in said city;" "to provide for maintaining the peace and good government of said city."

If the Legislature of the State had the power to subject the people of cities to the uncontrolled and arbitrary will of a common council, and, having such power, had clearly signified their purpose to do so,

then it might perhaps be claimed, with some show of reason, that the city of Grand Rapids could do what it pleased under these grants of power. But the rules of legal construction allow no such absurdity. It is not in the power of the Legislature to deprive any of the people of the enjoyment of equal privileges under the law, or to give cities any tyrannical powers. All charters, and all laws and regulations, to be valid for any purpose, must be capable of construction, and must be construed, in conformity to constitutional principles, and in harmony with the general laws of the land; and any by-law which violates any of the recognized principles of legal and equal rights is necessarily void, so far as it does so, and void entirely if it cannot be reasonably applied according to its terms. We must therefore construe this charter, and the powers it assumes to grant, so far as it is not plainly unconstitutional, as only conferring such power over the subjects referred to as will enable the city to keep order, and suppress mischief, in accordance with the limitations and conditions required by the rights of the people themselves, as secured by the principles of law, which cannot be less careful of private rights under a constitution than under the common law.

It is quite possible that some things have a greater tendency to produce danger and disorder in the cities than in smaller towns or in rural places. This may justify reasonable precautionary measures, but nothing further; and no inference can extend beyond the fair scope of powers granted for such a purpose, and no grant of absolute discretion to suppress lawful action altogether can be granted at all. That which is an

actual nuisance can be suppressed just so far as it is noxious, and its noxious character is the test of its wrongfulness. There may be substances, like some explosives, which are dangerous in cities under all circumstances, and made dangerous by city conditions; but most dangerous things are not so different in cities as to require more than increased or qualified safeguards, and to suppress things not absolutely dangerous, as an easy way of getting rid of the trouble of regulating them, is not a process tolerated under free institutions. Regulation, and not prohibition, unless under clear authority of the charter, and in cases where it is not oppressive, is the extent of city power.

It has been customary, from time immemorial, in all free countries, and in most civilized countries, for people who are assembled for common purposes to parade together, by day, or reasonable hours at night, with banners and other paraphernalia, and with music of various kinds. These processions, for political, religious, and social demonstrations, are resorted to for the express purpose of keeping unity of feeling and enthusiasm, and frequently to produce some effect on the public mind by the spectacle of union and numbers. They are a natural product and exponent of common aims, and valuable factors in furthering them. They are only found to any appreciable extent in places having collected inhabitants, for spectators are generally as important as members. They are among the incidental conditions of city life, and are as much to be expected, on suitable occasions, as any other public meetings, and not necessarily any more dangerous. They are, however, capable of perversion to bad uses,

and, when so perverted, may be dangerous. When people assemble in riotous mobs, and move for purposes opposed to private or public security, they become unlawful, and their members and abettors become punishable. These dangers are as well known as the customs themselves are, and are sometimes very great dangers. There may be times and occasions when such assemblies may for awhile be dangerous in themselves, because of inflammable conditions among the population. All of these things are as ancient as the law, and are generally within reach of the law, unless the law itself is, for the time, suspended by military necessity. During all this period of public history, cities have existed, and had powers of local administration. But it has never been supposed that they needed, or ought to possess, any repressive power over these movements which was not subservient and subsidiary to the general legal scheme of government.

It is only when political, religious, social, or other demonstrations create public disturbances, or operate as nuisance, or create or manifestly threaten some tangible public or private mischief, that the law interferes. And, when it interferes, it does so because of the evil done, or apparently menaced, and not because of the sentiments or purposes of the movement, if not otherwise unlawful; and things absolutely unlawful are not made so by local authority, but by general law. All may be capable of legal mischief by perversion, or by circumstances. It is lawful to provide for dealing with the mischief; but it is not lawful to go beyond reasonable measures and precautions in anticipating it. Pri-

vate liberty and public tranquility and security must both be kept in view.

We cannot accede to the suggestion that religious liberty includes the right to introduce and carry out every scheme or purpose which persons see fit to claim as part of their religious system. There is no legal authority to constrain belief; but no one can lawfully stretch his own liberty of action so as to interfere with that of his neighbors, or violate peace and good order. The whole criminal law might be practically superseded if, under pretext of liberty of conscience, the commission of a crime is made a religious dogma. It is a fundamental condition of all liberty, and necessary to civil society, that all men must exercise their rights in harmony, and must yield to such restrictions as are necessary to produce that result. It is not competent to make any exceptions either for or against the body of which petitioner is a member, because of its theories concerning practical work. In law, it has the same right, and is subject to the same restrictions, in its public demonstrations, as any secular body or society which uses similar means for drawing attention or creating interest.

Whatever regulation is made must operate uniformly, under the same conditions. It is competent to hold all persons liable for any actual wrong done which creates dangerous or noxious consequences. That is already provided for under the law of nuisances. These processions might, no doubt, become nuisances, as any others might do so, but it cannot be assumed that they will; and it appears in the record before us that they have been judicially adjudged otherwise when prosecuted.

Any doctrine that would hold them legally objectionable in themselves would cover every military or political or society procession that ever assumed respectable proportions. All by-laws made to regulate them must fix the conditions expressly and intelligibly, and not leave them to the caprice of any one. This doctrine, as applied to public officers, was recognized in *Horn vs. People*, 26 Mich. 221. It is quite as applicable to the Common Council acting by resolution on particular cases. The law must be impartial and general, or it is no law. *Waite vs. Garston Local Board of Garston*, L. R. 3 Q. B. 5. It is only where power is given to license that permissive action can be left to particular cases. If this were allowed in the case of processions, it would enable a mayor or council to shut off processions of those whose notions did not suit their views or tastes, in politics or religion, or any other matter on which men differ. When men in authority have arbitrary power, there can be no liberty.

It has never been found wise, and is not legally reasonable, to do more than fix such general conditions as are necessary to the good order of the community. All persons who resort to cities must accept the inconveniences with the benefits which attend such communities. Those things which must be expected must be endured, if they are within bounds of propriety. *Gilbert vs. Showerman*, 23 Mich. 448. It is not unusual to confine noisy doings to such hours of the day and night as will not grossly disturb the quiet rest of sleep. It has been held, with reason, that a moving crowd may be less obnoxious than a stationary one; and this was said, in substance, when a defendant, who drew crowds to

his windows by libelous pictures, and thereby blocked up a highway, undertook to justify himself by the processions of the judges and lord mayor. The remarks of Mr. Justice Park on the subject of crowds which may or may not be nuisances, in *Rex vs. Carlile*, 6 Car. & P. 636, are quite instructive on this head. Instances might also be suggested of the propriety of suspending noisy demonstrations at particular times or places, or where they would disturb public assemblies, or invalids, or where, for special and peculiar reasons, regulation is needed. It would not be wise to attempt any definition in advance of those things. The legal rule, that by-laws must be reasonable, is perhaps as definite as it can be made with safety.

This by-law is unreasonable, because it suppresses what is in general perfectly lawful, and because it leaves the power of permitting or restraining processions, and their courses, to an unregulated official discretion, when the whole matter, if regulated at all, must be by permanent, legal provisions, operating generally and impartially.

It is also objected to the fifth section of the by-law that it gives to the judge who tries the case a discretion in fixing the penalty up to the highest limit allowed for any purpose by the charter, instead of exercising the duty of fixing it absolutely, or within certain bounds, by provisions of by-law. The charter, (title 3, § 14,) both as amended in 1885 and as standing previously, declares that, where authority exists to pass ordinances, the Common Council may prescribe a fine, penalty, or forfeiture not exceeding \$500. This is simply putting in words what was implied in all corporate power to pass by-

laws at common law. It never can be mentioned, as a proper construction, that the Council can, without exercising any discretion themselves, turn over this extravagant power to the courts. It has been the general understanding, under the common law, that municipal penalties must be fixed, and not fluctuating. See cases cited in Ang. & A. Corp. § 360. In *Piper vs. Chappell*, 14 Mees. & W. 624, the legality of a penalty of five pounds, which might be made smaller, but not less than forty shillings, by the corporation officers, was maintained as being really a fixed penalty of five pounds, with power of mitigation by the corporation itself, thus reconciling it with the old authorities. How far a sliding scale of penalties is allowable, we need not now consider. These are civil, and not criminal, forfeitures, which, in the absence of other remedies, must be sued for in debt. It has never been customary in our State legislation to leave any discretion in courts upon penalties under highway acts and others involving no more than violations of legal provisions of a civic nature. It is enough to say, that no penalty can be sustained that exceeds in amount what is reasonable, and that the by-law cannot properly impose any sum, sliding or fixed, which exceeds that. See *Grand Rapids vs. Hughes*, 15 Mich. 54. No one, in his senses, could regard a penalty of \$500 for such trivial offenses as most of those covered by this by-law as within any bound of reason. The penalties must be fixed with regard to the offenses. They cannot all be thrown in together, large and small, under the same measure of punishment. If different classes of acts are considered as of different demerit, the by-law should so classify and punish them. It is



probable that no actual abuse has often been committed by the local court in fixing penalties ; but, when the law permits, such things are always possible, and, in cases exciting prejudice, are not unlikely to happen. The history of this by-law indicates that the petitioner and his associates have rightly or wrongly become obnoxious to hostile feeling.

As the petitioner was discharged on the hearing, no further order need be entered.

(The other justices concurred.)

[6.]

## CORRESPONDENCE WITH CITY CLERK.

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CELL No. 18, SUFFOLK JAIL,  
CHARLES ST., BOSTON, MASS.,  
11, 7, 1887.

*City Clerk of Boston:*

Wilt thou kindly inform me by letter *when* the ordinance of January 4, 1862, passed by the City Council of Boston, was set aside by a later act, which has been construed by the courts as "a continuation" of that ordinance.

I wish to know the form of the later act, and date of its enactment.

The act of January 4, 1862 is, I believe, as follows :  
"Sec. 11. No person shall deliver any sermon, lecture, address, or discourse on the Common, Public Garden, public squares, or common lands of the city, without the permission of the Mayor and Aldermen." I find in "Statutes and Ordinances compiled in 1876, page 594, Sect. 14, the above ordinance, until after the words "permission of," where, instead of the words "the Mayor and Aldermen," I find "the said joint committee of the City Council." An early answer will be gratefully received; and any just bill of expense attending the examination and reply will be cheerfully met on presentation, by thy servant in Christ, now in bonds

for a free Gospel for the common people on common lands of our Commonwealth,

WILLIAM F. DAVIS.

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OFFICE OF CITY CLERK,  
CITY OF BOSTON,

CITY HALL, Nov. 9, 1887.

REV. WM. F. DAVIS:

*Dear Sir:*—In reply to your letter of the 7th inst., I have to say, that the first notice of a change in the ordinance of 1862, mentioned by you, is in 1876, Sec. 14, relating to Parks, and passed Dec. 23, 1876, when "said joint committee of the City Council" was substituted for "Mayor and Aldermen." In 1882, Dec. 29th, which appears in the Revised Ordinances of 1883, the following was passed: "No person shall, except by permission of said committee, deliver a sermon, lecture, address or discourse on the Common, or other public grounds."

On Dec. 14th, 1885, the Revised Ordinances of that year were approved, and the only change in the above ordinance was the striking out of the words "said committee," and substituting the word "Mayor;" and it so stands to-day.

Yours respectfully,

J. H. O'NEIL.









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